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THE
AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

EDITED BY
WILLIAM M. MCKINNEY,

VOLUME XLVI.

NORTHPORT, LONG ISLAND, N. Y.
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THE
AMERICAN AND ENGLISH
RAILROAD CASES.

VOLUME XLVI.

ST. LOUIS R. CO.

v.

SOUTHERN R. CO.

(Missouri Supreme Court, Division No. 2, March 31, 1891.)

Street Railway—Use of Tracks of Other Companies—Right of Public to Grant.—The public has the reserved right to grant the use of street railway tracks to companies other than those constructing them, upon making just compensation.

Same—Same—By the Charter of the City of St. Louis, of 1876, any street railway company has the right to run its cars over the track of another company in that city, upon payment of just compensation for the use thereof, under such regulations as the municipal assembly may by ordinance prescribe; and the municipal assembly has the power to pass ordinances to enforce this right.

Same—Amendment of Franchise—Company Subjecting Itself to Ordinances. A street railway company whose charter antedated that of the city, and which was not, accordingly, subject to the above provision, as a condition to the grant of additional franchises, agreed to conform to any ordinance then existing, or that might thereafter be passed, enforcing the above provisions of the city charter. *Held*, that the company made its right to operate its road subject to the provisions of the charter, and conceded the right of other companies of the city to use its tracks, and became subject to an ordinance subsequently passed providing the mode of ascertaining the compensation.

Same—Compensation for Use of Tracks—Appeal to Circuit Court.—If the award of commissioners, provided for by the city ordinance as compensation for the use of tracks, is not satisfactory to the company owning them, it can either adopt the special mode of procedure by appeal to the circuit court as provided in the ordinance, or may apply to the court under its general jurisdiction. The city had authority to provide in such ordinance such special remedy for the party aggrieved, by way of a review of the award of the commissioners by the circuit court.

Relation Between City and Street Railway Company.—The relation between the city of St. Louis and the St. Louis R. Co., by reason of the passage of certain ordinances by the city, and the acceptance of the same by the railroad company, held to be contractual as contradistinguished from legal.

GANTT, P. J., dissenting.

APPEAL from St. Louis Circuit Court.

Lubke & Muench and Leverett Bell, for appellant.

Hitchcock, Madill & Finkelnburg and Smith P. Sault, for respondent.

THOMAS, J.—This is a proceeding by the plaintiff, a street railway company of the city of St. Louis, to restrain the defendant corporation, which is likewise a street railway company of said city, from proceeding to appropriate and take possession of a part of plaintiff's railway tracks, under and by virtue solely of a city ordinance of the city of St. Louis. The facts, briefly stated, are as follows: Defendant, the Southern Railway Company, has for a number of years operated a horse railway from Carondelet (South St. Louis) northwardly to the corner of Sixth and Market streets. In the year 1887 defendant thought it advantageous and profitable to extend its road further north to Wash street. To accomplish this object, it determined to run its cars over the tracks of three other street railroads, viz: The Missouri Railroad, one block along Market street; the Union Railway, six blocks along Sixth street; and the Union Depot Railroad, two blocks along Sixth street—thereby (with the aid of but two blocks of original construction) forming a loop, which would begin and end at the regular terminus of defendant's road at the intersection of Sixth and Market streets. For the purpose of carrying out the above plan, the defendant company procured an ordinance of the city of St. Louis, being ordinance No. 14,089, approved July 19, 1887, authorizing it to acquire rights of way over the tracks of said three roads, and, in case of failure to agree, attempting to authorize the defendant company to obtain such rights by virtue of city ordinance No. 12,652.

Said ordinance No. 12,652 is in words and figures as follows: "An ordinance to carry out the provisions of § 6 of article 10 of the charter of the city of St. Louis, and to prescribe rules to ascertain and fix the compensation for the use of the track or part or parts of track of street railroad companies. Be it ordained by the municipal assembly of the city of St. Louis as follows: Section 1. Any street railroad company, which is or may be hereafter authorized by ordinance of the city of St. Louis to operate a line of street railroad cars along, across, or upon any street or streets of said city, along, across, or upon which street or streets any other street railroad company then owns a street railroad, said first mentioned company may operate and run its cars over the track of said other company, across, along, and upon such streets as it may, by ordinance aforesaid, be authorized to run

and operate its road, upon the payment of just compensation, to be ascertained under the rules and regulations hereinafter prescribed. Sec. 2. When any street railroad company shall desire to operate a line of street cars over the track of any other street railroad company, or part thereof, as provided in the first section of this ordinance, and agreement cannot be had between such companies as to the compensation to be paid therefor by the company so desiring, said compensation shall be ascertained by a commission of three disinterested freeholders of the city of St. Louis, to be chosen and appointed in the following manner, to-wit: The company desiring to use said track may make written application to that effect to the mayor of said city, accompanied by plans and specifications showing the extent of the track it desires to use, first giving ten days' notice in writing to the railroad company whose track it is designed to use, of the time and purpose of such application. On receipt of the same, with evidence of notice as aforesaid, the mayor shall forthwith give notice to each of said companies to report to him in writing, within ten days thereafter, the name and address of one disinterested freeholder of the city of St. Louis, to act as its chosen commissioner. Upon the expiration of the ten days aforesaid, the mayor shall forthwith appoint a third disinterested freeholder of the city of St. Louis to act as commissioner, and shall also appoint one such freeholder to represent either of such companies which shall have refused or neglected to appoint a commissioner within the time aforesaid. Thereupon the mayor shall forthwith give notice to the commissioners so appointed of their appointment, and shall turn over to them all papers in his possession relating to the matter in controversy; and in case of vacancy in such board of commissioners, caused by death or refusal to serve of any of said commissioners, or for any other cause whatsoever, the mayor shall appoint a commissioner to fill such vacancy. All the commissioners provided for under the provisions of this ordinance shall be freeholders, resident of the city of St. Louis, and shall not be interested in any manner as stockholders, bondholders, lienholders, or officers or employes of either of the street railroad companies in question. When appointed, said commissioners shall proceed to determine the compensation to be paid, and the time and manner of its payment; provided, that in case one or more street railroad companies shall thereafter be authorized to operate, and do cause to be operated, a line of street railroad cars upon said track, the compensation paid by the company or companies already occupying said track may, upon application of either of said companies to the mayor, be revised and readjusted by a com-

mission of three disinterested freeholders, chosen and appointed in the manner herein prescribed; and either party may apply for a readjustment of the terms of compensation once in each period of two years, to be determined as herein prescribed. Sec. 3. The said commissioners, before proceeding to hear any testimony, shall take and subscribe an oath, before some officer duly authorized to administer an oath, that they possess all the qualifications required in the preceding section of this ordinance, and that they will faithfully and fairly hear and examine the matter in controversy, and make a just award, to the best of their understanding, which oath shall be filed and returned with the award. They shall meet together, and view the track or parts of track proposed to be used by the company making the application, and shall hear testimony of witnesses, and the proofs and allegations of the parties to the proceedings, as to the value of said tracks, and as to the compensation to be paid to the company whose track is to be used, and such damages as the commissioners may deem unjust; and upon the close of the testimony shall, without unnecessary delay, make a report in writing of their decision and award, which report shall be signed by them or a majority of them, and addressed and delivered to the mayor forthwith upon its completion. Such commissioners shall be entitled to ten dollars each per day for their expenses and services for the first ten days they are actually engaged in performing their duties, and one dollar for each succeeding day actually employed thereafter, to be paid by the company making the application. Sec. 4. On the reception of the said report of the commissioners by the mayor, he shall file the same, together with the original application, and all papers pertaining to the proceedings, with the city register, and shall immediately notify the parties of the decision of the commissioners, and of the filing of their report, and thereupon, and on payment by the company making the application of the amount of the compensation awarded in said report, or after paying the same into the circuit court for the company whose track it is proposed to use, and upon payment of the costs and expenses of the commissioners, and upon filing with the city register a bond in the sum of twenty thousand dollars, with two good and sufficient securities, owners of unincumbered real estate in the city of St. Louis, which bond shall be approved by the mayor and council—said bond shall be conditioned for the payment to the company whose track or tracks are to be used for such additional compensation as may be ordered to be paid by circuit court on any proceeding therein, as provided in section five of this ordinance—the first named company shall be entitled, without further delay, to

enter upon and run its cars over the track, or part or parts of the track, mentioned and described in the report of such commissioners. Sec. 5. Upon the filing of such report of said commissioners, the register shall duly notify both parties to the controversy of the filing thereof, and either party to such controversy may, at any time within ten days after the service of such notice as aforesaid, appeal to the circuit court of the city of St. Louis for a review of the report of said commissioners, by filing with the clerk of said court written exceptions to said report, and serving a copy of such exceptions upon the opposite party, together with notice of the time of filing the same; and the court may thereupon make such order therein as right and justice may require, and may order a new appraisalment in the manner hereinbefore prescribed, upon good cause shown; but, notwithstanding such appeal, the company may operate its cars over such track or parts of track as the report of the commissioners may designate, and any subsequent proceeding shall affect only the amount of compensation to be paid, and the manner and time of payment. Sec. 6. The company using the track, or part or parts of the track, of another company, under the provisions of the ordinance, shall run its cars while on said track at the same rate of speed as the cars of the company owning said track, and shall construct and keep its connections with the track of the company so as not to delay or interfere with the cars of the company owning the track. Any company using the track of another company, in whole or in part, shall charge no more than one passage over its whole line. Approved January 12, 1884."

Section 6 of article 10 of the charter of the city of St. Louis, which went into force October 22, 1876, and which section is referred to in the title of the above ordinance, is as follows: "Any street railroad company shall have the right to run its cars over the track of any other street railroad company, in whole or in part, upon the payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance, and it shall be the duty of the municipal assembly to immediately pass such ordinance as may be necessary to carry this provision into effect." Section 1 of article 10 of said charter is as follows: "The municipal assembly shall have power, by ordinance, to determine all questions arising with reference to street railroads, in the corporate limits of the city, whether such questions involve the construction of such street railroads granting the right of way, or regulating and controlling them after their completion; and also shall have power to sell the franchise or right of way for such street railroads to the highest bidder, or, as

a consideration therefor, to impose a *per capita* tax on the passengers transported, or an annual tax on the gross earnings of such railroad or on each car; and no street railroad shall hereafter be incorporated or built in the city of St. Louis, except according to the above and other conditions of this charter, and in such manner and to such extent as may be provided by ordinance."

In November, 1887, after some unsuccessful negotiations, the defendant company gave notice to the St. Louis Railroad Company, the Union Railway Company, and the Union Depot Railroad Company that on the 12th day of December, 1887, it would apply to the mayor of the city of St. Louis for the appointment of commissioners to determine the amount and mode of compensation by it to be made for the use of their respective tracks, in pursuance of the ordinance above set out; and thereupon the mayor issued a written order, and caused the same to be served on said three railroad companies, requesting them to appear before him within 10 days to take steps prescribed in said ordinance No. 12,652. Thereupon the three companies aforesaid filed their suits, respectively, against the defendant company and the mayor of the city of St. Louis, praying for an injunction against the threatened appropriation of their tracks. This suit is one of the three thus filed.

The St. Louis Railroad Company was incorporated in 1859, for a period of 50 years, and since that time has been maintaining its railway on Fifth street, (now Broadway.) The plaintiff, after the necessary allegations concerning its incorporation, its ownership of and the right to operate its railroad on certain streets in the city of St. Louis, as well as the right to the continued use thereof for many years to come, alleges that the defendant mayor threatens and is about to appoint three commissioners, one of them having been selected by the defendant company, to assess and award compensation and damages to the plaintiff for the appropriation and use of and damages to the plaintiff's railroad property and franchise, to be paid by the defendant company; and that, upon such award being made by the mayor, the defendant company threatens to and will appropriate and use a portion of the plaintiff's railroad track in the streets of said city as set forth in the petition; and plaintiff in its said petition states that all said contemplated and threatened acts of the defendant are without any warrant of law, and in violation of the constitution and laws of the state, and are and will be a trespass upon and a continuous and irreparable damage to the plaintiff and its property and franchise, and will materially affect the use of said property of the plaintiff for

its purposes, as authorized by law, and the matters complained of will be accomplished before the questions involved can be decided in course upon the merits. Therefore the plaintiff asks the protection of the court, and that it will, by preliminary injunction, restrain and enjoin the defendants from doing the acts threatened and complained of until its complaint may be heard upon its merits, and thereupon that said restraining order may be made perpetual. The mayor's answer was a general denial. The defendant corporation in its answer admitted the facts alleged in the petition, except the change of its motive power, but claimed that the municipal assembly had the power to confer upon it the right to use the tracks of plaintiff, under the charter and ordinances of the city.

From the pleadings and evidence it appeared that, after the charter of the city hereinbefore mentioned went into effect, said St. Louis Railroad Company accepted from the city, in the manner therein required, ordinance 12,477, approved March 27, 1883, of which ordinance the following sections, numbered 4 and 5, are part: "Sec. 4. The St. Louis Railroad Company shall not be entitled to any of the rights or franchises granted by this ordinance, unless within thirty days from the approval thereof it file with the city register its written acceptance of the terms and conditions of said ordinance, and also its penal bond in the sum of twenty thousand dollars, payable to the city of St. Louis, to be approved by the mayor and council, conditioned that said St. Louis Railroad Company shall and will perform and comply with all the terms and conditions of this ordinance. Sec. 5. It is expressly understood that, by the acceptance of the provisions of this ordinance by the St. Louis Railroad Company, said company waive all rights it may have to streets within three blocks of this railway claimed under the act of the general assembly approved January 16, 1860, and that it will conform to any ordinance now existing, or hereafter passed, enforcing article 10 of the city charter, not inconsistent with the provisions of this ordinance." On the 2nd day of August, 1887, ordinance No. 12,477, was amended by the municipal assembly, by ordinance, so as to enlarge the rights and franchises of respondent. This amendatory ordinance required respondent to file its acceptance thereof within 30 days after its passage in order to enjoy the new franchises granted, which respondent did. A temporary injunction was granted, which on a hearing was made final, and defendant appeals.

The true relation of the city of St. Louis to the St. Louis Railroad Company is the question of prime importance in this case. The argument in support of the decree of the trial

court is based upon the assumption that the city was about to attempt to appropriate the property of this company for the use of the Southern Railway Company by the exercise of the paramount right of eminent domain, and, the city having no such power under the constitution and laws of Missouri, this attempt, if the city were permitted to consummate it, would be an arbitrary and illegal invasion of the property rights of respondent, and therefore ought to be enjoined by a court of equity. If this assumption be correct, there would be much force in the argument, but we regard the relation between the city and the St. Louis Railroad Company as contractual, as contradistinguished from legal. If there exists between the city and this company a valid contract, then the rights and powers of the respective parties must be determined by reference to the terms of that contract, rather than the law. If there be a contract therefore, it will be unnecessary for us to inquire into and determine the nature of the right of eminent domain, and the manner of its exercise, as well as the question as to the extent of the city's right of eminent domain.

The present charter of the city was adopted by the people of the city under a constitutional provision of the state. It must, however, be regarded simply as a legislative grant. In other words, this charter has no greater force and effect than it would have if the general assembly had enacted it, but it does have that force and effect. The city government is not an *imperium in imperio*, but as to all matters of local concern its authority and power are exclusive, to the extent declared by the charter, where it does not conflict with the constitution and laws of the state. Full authority is conferred upon the city government to open and improve the streets, and control their use. Indeed, all cities have this power. The state is prohibited by § 20, art. 12, of the constitution, from passing any law granting the right to construct and operate a street railroad in any city, town, village, or public highway without the consent of the local authorities. But in an especial manner is the city of St. Louis clothed with plenary power by its charter in regard to the construction of railways in its streets. By § 1 of article 10 of the charter above quoted it has full power to determine all questions in reference to street railways. Hence, when it grants the right of way in its streets to a street railway corporation, it does not proceed in the exercise of the power of eminent domain, but it proceeds in the exercise of its right of ownership of the streets, and it is limited in the exercise of this right to the extent only that the grant shall be for the public use and convenience.

Relation between the railroad company and the city.

Authority conferred by city charter.

Let us examine now what relation the city of St. Louis and respondent sustain to each other under the charter and ordinances of the municipal government. Respondent's original charter antedated the present charter of the city, and its franchises could not have been destroyed or made less valuable by the municipal assembly, except by virtue of the former's charter or consent. The present city charter went into operation the 22d day of October, 1876. On the 27th day of March, 1883, respondent obtained from the city additional franchises and rights. In order to obtain and enjoy these, it was required to agree, and it did agree, to conform to any ordinance then existing, or thereafter to be passed, enforcing article 10 of the city charter, not inconsistent with the provisions of the ordinance granting the new franchises. The petition, answer, and arguments of counsel on both sides in this case proceed upon the theory that respondent was, at the commencement of this action, and is now, enjoying its rights and franchises under the charter of St. Louis of 1876, and must conform to its requirements. So far, then, as the questions involved in this case are concerned, the respondent's charter rights must be held to have originated under the city charter of 1876, and are subject to it. By § 6 of article 10 of the charter of the city, it is provided that "any street railroad company shall have the right to run its cars over the track of any other street railroad company, in whole or in part, upon the payment of just compensation for the use thereof, under such rules and regulations as may be prescribed by ordinance; and it shall be the duty of the municipal assembly to immediately pass such ordinances as may be necessary to carry this provision into effect." One thing is definitely settled by this provision, and that is, all street railroads in St. Louis are public highways. Any street railroad company has the right to run its cars over the track of another company, and the only limitation on this right is that just compensation shall be made, and the consent of the city obtained, subject to control at all times by the city. Another proposition is settled by the record in this case, and that is a street railroad is for a use that is public. A city has no authority to grant its streets for any use that is private. *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 121, 5 Am. & Eng. Corp. Cas. 417. The petition in this case avers that the defendant corporation is a street railway company, operating cars to carry passengers. *Glaessner v. Anheuser—Busch Brewing Ass'n*, 100 Mo. 508; *Mikesell v. Durkee*, 34 Kan. 509. Thus the respondent virtually concedes that the Southern Railroad Company is using the streets of

Company sub-
ject to charter
of 1876.

Street rail-
roads as pub-
lic highways
—Public use.

St. Louis for a public purpose, and proposes to use respondent's track for a public purpose. The respondent itself has no other right to the use of the streets of the city under its charter than that based on the theory that it is using them for its street railway for a public purpose. Counsel in argument confuse two distinct propositions. One proposition refers to what is a public use, and the other to public convenience or utility. A certain enterprise may be, beyond question, for a public use, and yet there may be no public demand for it. Whether a use is a public one or not is for the courts to determine, and is not a question for a jury. *City of Savannah v. Hancock*, 91 Mo. 57; *City of Kansas v. Baird*, 98 Mo. 215. A road, street, or alley laid out and opened by the proper authority under the law, and dedicated to the public, would be for a public use, though not a single person might ever use it. The court determines whether a contemplated use is public, but whether the public convenience requires the use in a given case is a question of fact which may very properly be submitted to a jury. When the constitution, therefore, provides that when "an attempt is made to take private property for a use that is alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined," it was simply meant that the courts should determine whether the use was public, as contradistinguished from private, leaving the question of public convenience or utility to be determined in the manner provided by law. The municipality of St. Louis, being clothed with the power to grant or withhold street railroad franchises, must determine for itself when a contemplated street railway is demanded by the public convenience. It cannot grant the right to the streets for a use that is not public, but when the use is public it is the sole judge as to its utility. To prevent the granting of a franchise for public use, which would not be of advantage to the people, an appeal must be made to the city authorities, and to them alone. This was expressly ruled in the cases of *City of Savannah v. Hancock* and *City of Kansas v. Baird*, cited above. This discretion of the municipality is always subject, however, to review by the courts in the exercise of equitable jurisdiction to prevent oppression and fraud, and again the courts must recognize the fact that street railroads have become important and valuable institutions, as means of rapid transit in our cities and towns. The courts must, as a matter of law, declare a street railroad, operated solely for the carrying of passengers, a public highway, and its use a public use. Upon the record before us we must hold that the use of the streets of St. Louis by respondent and the Southern Railway Company is a public use. The question,

therefore, of the nature of the use the defendant corporation proposed to make of respondent's track is settled by the record. By agreeing in 1883 "to conform to any ordinance now existing, or hereafter passed, enforcing article 10 of the city charter," in consideration of valuable franchises then granted to it by the city, respondent must be held to admit the right of the city to authorize the Southern Railway Company to run its cars over the track of respondent, in whole or in part, upon payment of just compensation.

The compensation to be made for the use of the track of one company by another is not fixed, nor, indeed, could it be, by any general ordinance. It is simply provided that the compensation shall be "just." It is argued that the subsequent clauses of section 6 of article 10 of the city charter did not confer power on the municipal assembly to make provision for ascertaining the compensation to be made in such cases, and that the clause, "under such rules and regulations as may be prescribed by ordinance," does not qualify the clause, "upon the payment of just compensation for the use thereof," but qualifies the first clause, that "any street railroad company shall have the right to run its cars over the track of another street railroad company in whole or in part." By omitting one clause, the reading would be that "any street railroad company shall have the right to run its cars over the track of any other street railroad company, in whole or in part, * * * under such rules and regulations as may be prescribed by ordinance," and this would conform to the view taken by counsel for respondent. In other words, it is claimed that this section conferred power on the municipal assembly to authorize one company to use the track of another, and to control each company in the use of the track and the running of its cars, but did not authorize such assembly to prescribe any method by which the just compensation for such use could be ascertained. We do not concur in this view of the meaning of that section.

It seems clear enough that the city had the right to prescribe, not only the method of running the cars of one company over the track of another, but also to prescribe a method of ascertaining the compensation that should be made for such use. But, whether this conclusion be correct or not, the concluding part of this section, taken in connection with the first section of article 10 of the charter, undoubtedly confers this power. This part is in these words, "and it shall be the duty of the municipal assembly immediately to pass such ordinances as may be necessary to carry this provision into effect." What provision? Evidently the provision in

Ascertain-
ment of com-
pensation.

regard to the use by one company of the track of another upon payment of just compensation. If it was intended that one company desiring to use the track of another under this section, had to resort to the proceeding provided for under the constitution and general law in regard to the appropriation of private property for public use, why make any provision at all in the charter about it? Indeed, when we go to the constitution, we find the state has subordinated its power to that of the local authority, and surrendered its right to act without consent of the municipality, nor can we find any provision in the general statutes for the condemnation of the use of a street railway track for another company. Articles 2 and 6 of chapter 21 of the Revised Statutes of 1879 did not provide for nor contemplate any summary proceeding for any such condemnation, and when we consider section 20 of article 12 of the constitution, and the absolute and unreserved control given the city of St. Louis by article 10 of its charter over the construction and operation of street railways, and the fact that no provision is made by general statute for any joint action of the city and state authorities in regard to any question affecting these methods of travel, either in obtaining the right of way, joint use, or operation, it is manifest that the general assembly intended to leave, and did leave, the whole subject to the municipal government. When the city authorities granted respondent, in March, 1883, additional and valuable franchises, it could have granted them on condition that the city might authorize any other company to use its track without any compensation whatever, and, if respondent had accepted the franchises on this condition, it could not be heard to complain afterwards; and, if this could have been done, *a fortiori* could the city grant the franchises on condition that respondent agree to conform to any ordinance then existing, or that might thereafter be passed, enforcing the right of one company to use of the track of another, upon payment of just compensation therefor, and when this condition was accepted respondent became bound by its agreement. The city owned the streets, and had control of them for the public. The respondent owned certain franchises, and had certain property rights in its then lines of railroad. It appealed to the municipal assembly for an extension and enlargement of its franchises in reference to the use of the streets. The city replied that section 6 of article 10 of its charter provided that any street railroad company might run its cars over the track of another upon payment of just compensation for the use thereof, under such rules and regulations as might be prescribed by ordinance, and that the municipal assembly had power by ordinance

to carry that provision into effect; that respondent, whose charter antedated that of the city, was not subject to that provision; and that these franchises would be granted on condition that respondent agree to conform to any ordinance then existing, or that might be thereafter passed, enforcing that provision of the city charter. Respondent accepted franchises, and agreed to the condition. The two owners met, and agreed upon the relation they would sustain towards each other. This was fixed by contract, and, being thus fixed, the doctrine of eminent domain, with all that doctrine implies, is eliminated from the case. This constituted a contract binding both upon the city and respondent. *State v. Corrigan Consolidated St. R. Co.*, 85 Mo. 263, loc. cit. 278, 282; *City of St. Louis v. Missouri R. Co.*, 87 Mo. 151, 13 Mo. App. 524; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.), 358; *Owen v. St. Louis & S. F. R. Co.*, 83 Mo. 454, 25 Am. & Eng. R. Cas. 371; *Elliott, Roads & S.* 565; *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61; *Campbell v. Marietta & C. R. Co.*, 23 Ohio St. 168; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 13 Am. & Eng. R. Cas. 380; *State v. Chicago, B. & K. C. R. Co.*, 89 Mo. 523; *State v. Keokuk & W. R. Co.*, 66 Mo. 30, 41 Am. & Eng. R. Cas. 694.

In *Kinsman St. R. Co. v. Broadway & N. S. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327, the plaintiff corporation was authorized, in 1859, to construct and operate a street railway in the city of Cleveland, subject to such restrictions as the council may hereafter pass." In 1874 the council passed an ordinance authorizing the defendant corporation to use and occupy certain streets for a street railroad, and authorizing it to use the tracks of the plaintiff "on such terms of compensation" as may be agreed upon by the parties, "and, in case of failure or inability to make such agreement within sixty days from the date of the passage of this ordinance, such terms of compensation shall be prescribed by the city council." The parties failed to agree, and the council accordingly fixed such compensation at the sum of \$2,153, and in addition thereto one-third of the expense thereafter incurred in keeping the tracks in repair. The amount of compensation thus fixed was tendered by the defendant to the plaintiff, but was refused by the latter. Plaintiff then commenced an action against defendant to restrain the latter from the use of its tracks, chiefly on the ground, as alleged, that the compensation fixed and tendered was not adequate. No proof, however, was offered as to the issue of compensation. The case went to the supreme court of Ohio, and was determined at

Same—Cases
in Ohio.

the January term, 1880. In that case, as in the one at bar, counsel elaborately argued the questions arising out of and incident to the exercise of the power of eminent domain. McILVAINE, C. J., speaking for the court, after discussing some of the questions presented in regard to the power of eminent domain, concluded thus: "But in this case we find a stipulation to have been made, namely, that plaintiff would lay its tracks under the terms and conditions prescribed by the ordinance of September 20, 1859, or which might thereafter be prescribed by the city council; and also that the East Cleveland Street Railroad Company, a corporation then in existence, [not the defendant corporation, however] should be allowed the use of the plaintiff's tracks upon reasonable terms, to be prescribed by the council, unless agreed upon by the parties. The right of the council to prescribe terms and conditions in the future, it seems to us, was sufficiently broad to cover a future exigency like the one then existing and specially provided for; namely, an exigency arising from the necessity to provide for the public welfare by running the cars of other street railroad companies over the track of the plaintiff. And, this being so, the only remaining question is, was the condition as to the compensation to be paid by the Broadway & Newburg Company to the plaintiff reasonable? In other words, was the compensation as fixed by the council fair and adequate? Upon this question issue was joined, but no testimony offered. The burden of showing its inadequacy rests upon the plaintiff. Under these circumstances, the injunction prayed for must be denied." The Ohio court went much further in refusing relief than we have to go in the case at bar to refuse relief to respondent. In the Ohio case the council fixed the compensation to be made when the parties failed to agree. In the case at bar respondent was given an opportunity to appoint one commissioner, and to be heard before the commissioners. This was declined. In the Ohio case the plaintiff constructed its road subject to "such restrictions" as the council might thereafter pass. There the council had to provide, not only the mode of ascertaining the compensation, but also had to confer upon the defendant corporation the right to use the track of the plaintiff. Here the city charter, accepted by respondent, conferred the right upon any street railroad company to use the track of another, upon payment of just compensation for the use thereof, under such rules and regulations as the council might prescribe by ordinance, and that the council should pass ordinances to carry out that provision. The Ohio case is the only case cited by counsel, or that we could find, where the result reached by the court was based on a stipulation or contract.

Ordinance No. 14,089 authorized the defendant company to use the track of respondent on compliance with the provision of ordinance No. 12,652. This ordinance is given in full in this opinion, and seems a reasonable provision to carry into effect article 10 of the charter. When the Southern Railway Company was authorized by ordinance, in 1887, to run its cars over the track of respondent's railroad, and was about to proceed to ascertain what compensation it should make to respondent for the use thereof, under ordinance No. 12,652, the latter instituted this suit, and the contemplated action of the mayor and the Southern Railway Company was perpetually enjoined. Respondent made no allegation, nor offered any evidence, that the use of its track, as contemplated by the Southern Railway Company, was not a public use, nor that the compensation proposed to be made for such use was not just, for the injunction was obtained before the compensation had been ascertained. Hence this injunction was procured, not upon the grounds that the contemplated use was not a public use, and the compensation offered was not just, but upon the ground that the city authorities had no power to condemn the use of respondent's track for the Southern Railway Company, whether with or without the payment of just compensation therefor. The respondent has no right to come into a court of equity, and repudiate its own stipulations, and ask an injunction against the other contracting party, upon the ground that, if it had made no contract, it would have been entitled to have the question as to whether the contemplated use was a public one judicially determined by a court, and to a trial by jury as to the compensation it should receive. By its acceptance of the ordinance of March 27, 1883, it conceded the right of any street railroad company to the use of its track upon the payment of just compensation, and it authorized the city to prescribe the method by which such compensation should be ascertained. According to our view of respondent's stipulations, the only possible controversy that could arise between it and the city is the amount it should receive from another company for the use of its track. If the commissioners provided for would not award "just compensation," respondent had its remedy.

It is insisted that the provision made in the ordinance of January 12, 1884, for having the commissioner's award reviewed by the circuit court, is void, upon the ground that the city of St. Louis could not by an ordinance confer jurisdiction on the circuit court. Counsel for defendant replies to this position by referring to the jurisdiction conferred on the cir-

Respondent's
concessions
by acceptance
of ordinances.

Provision for
review of
award by
court.

cuit court by the charter of the city, in regard to the condemnation of property for streets and alleys. As we have seen, this charter has the effect of a legislative grant, and hence this jurisdiction was not conferred by the city, in its municipal capacity, but by virtue of a vote of the people of the city, this vote being authorized by the whole people of the state in their constitution. No such jurisdiction as is here claimed, and in the mode claimed, is conferred on the circuit court by the charter, when a controversy arises as to the use of the track of one company by another. If such jurisdiction exists, it is by virtue of the constitution and of the general law or by virtue of the ordinance named. This is an important question, and we regret the eminent counsel engaged on both sides of this case contented themselves, one by a simple statement that no such jurisdiction existed, without citation of authority, and the other by the reference to the jurisdiction conferred by the charter on circuit courts in street condemnation cases, which is not an analogous case. We are satisfied, however, beyond question, that the ordinance is valid, so far at least as it provides for the appointment of commissioners to fix the compensation one company should pay for the use of the track of another, where the companies interested failed to agree. A law or ordinance may be valid in part and void in part. *City of St. Louis v. St. Louis R. Co.*, 14 Mo. App. 221, and cases cited, 89 Mo. 44, 26 Am. & Eng. R. Cas. 534; *State v. Clark*, 54 Mo. 17.

If that part of the ordinance providing for a review of the award by the circuit court be void, for want of authority in the municipal assembly to enact it, the ordinance stands as if that provision had not been added. In that case provision is made (1) for the agreement of the roads interested as to the compensation; and, (2) in case of failure to agree, for the appointment of three disinterested freeholders, who should ascertain and report to the mayor the compensation to be made; and the cases cited show that such an ordinance is valid. As we have seen, there is no provision made by general statute for the condemnation of the use of a street railway for another company, and that absolute control over the construction of street railways in the city of St. Louis has been delegated by the state to the city government, and we cannot see why the provision of the ordinance under review may not be a valid exercise of municipal power. This ordinance does not attempt to confer jurisdiction on the circuit court over the subject matter. In *State v. Southern R. Co.*, 100 Mo. 61, an application was made to this court for a writ of prohibition, to prevent the circuit court of the city of St. Louis from assuming jurisdiction to condemn the right of way over the tracks

of the relator for the cars of defendant. BARCLAY, J., speaking for the court, said: "That the circuit court of St. Louis has jurisdiction of proceedings to appropriate property to public use in the exercise of the right of eminent domain in a proper case is unquestioned and unquestionable. But the substance of the petitioners' contention here, as well as the ground on which they, as defendants, resisted the proceedings in the circuit court, is that the statutes and ordinances do not authorize the exercise of such jurisdiction on behalf of the Southern Railway Company. * * * The circuit court, in the case in question here, had power to entertain proceedings of the general class to which that case belonged, namely, of proceedings for the condemnation of property for public use." And the court refused the writ, not on the ground that the circuit court had jurisdiction in that particular case, but because it had jurisdiction of proceedings of the general class to which that case belonged; and if the circuit court assumed jurisdiction in the particular case, when it had none, the remedy was by appeal. If the circuit court of St. Louis, then, had no jurisdiction to condemn the track of one company for the use of another, it was not because of lack of jurisdiction of the general subject matter, but because the property to be affected was situated in the limits of the city of St. Louis, and no mode of procedure was provided for such case. There being, however, a right, the circuit court, in a case like this, might, in the exercise of its general jurisdiction, afford a remedy, under the Code of Civil Procedure. Now, could the city, by virtue of its charter, confer jurisdiction on the circuit court by providing a special mode of procedure in regard to a subject over which it already had general jurisdiction? Judge Dillon, in his work on *Municipal Corporations*, (4th Ed.) § 308, says: "Although the proposition that the legislature of a state is alone competent to make laws is true, yet it is also settled that it is competent for the legislature to delegate to municipal corporations the power to make by-laws and ordinances, which, when authorized, have the force, in favor of the municipality and against persons bound thereby, of laws passed by the legislature of the state." And the cases cited in the foot-note fully sustain the general doctrine announced in the text. In *City of St. Louis v. Boffinger*, 19 Mo. 13, it was held that, in the exercise of a power given in the charter "to make quarantine laws, * * * the government of the city must have a discretion, as wide as that possessed by the government of the state, in choosing between different measures for accomplishing the end. When an ordinance is passed under this grant of power, it is in force by

the authority of the state, and is to be interpreted and executed as if it had been passed by the general assembly." In *Taylor v. City of Carondelet*, 22 Mo. 105, Judge SCOTT, speaking of the effect of an ordinance of a city, says: "The legislature delegated its judicial powers over the matter to the corporation, and the corporation, within the sphere of its delegated power, could act as authoritatively in relation to it as the legislature. The law-making power, in fact, made the board of trustees a miniature general assembly, and gave their ordinances on this subject the force of laws passed by the legislature of the state." The principle here announced was approved again in *City of Carondelet v. Lannan*, 26 Mo. 461. In *State v. Clarke*, 54 Mo. 17, the question arose as to the power of the city to pass an ordinance to regulate bawdy-houses, in contravention of a general statute of the state prohibiting them, and NAPTON, J., speaking for a majority of the court, said: "The legislature have a right to change the common law; it has a right to allow the legislative authorities of St. Louis to regulate the subject now under consideration differently from what it is in other portions of the state." And it was held that the city ordinance repealed the general law, within the limits of the city; and this doctrine was again approved in *State v. De Bar*, 58 Mo. 395, and again in *Givens v. Van Studdiford*, 86 Mo. 149. If we take the affirmative power given the city by article 10 of its charter in regard to street railways, in connection with the negation of state interference by section 20 of article 12 of the constitution, we find probably a more absolute and unreserved grant of power to this municipality over the subject of the construction and regulation of street railways, in the city limits, than can be found anywhere else in this country. By this article the municipal assembly has the grant of power to determine all questions arising with reference to street railroads, whether they involve the construction of the roads, granting the right of way, or regulating or controlling them. Then comes section 6, with the powers conferred by it.

The city government undoubtedly had the authority to pass ordinance No. 12,652, including that part providing for a review of the award of the commissioners by the circuit court. This ordinance, having been passed in pursuance of the power conferred on it by the state, must be held to have the force of law, in the city limits to the same extent as if passed by the legislature of the state. This ordinance does not attempt to confer jurisdiction of the subject matter on the circuit court, but simply provides a special remedy for a party aggrieved, to have the award of the commissioners reviewed by the circuit court; and if, as we have shown, this

ordinance has the force of a law of the state, and must be interpreted and executed as such, this remedy is provided by a law of the state, in legal contemplation. This ordinance, in regard to exceptions to the award, adopts the provisions of the general statute on the same subject substantially; and when the circuit court gets jurisdiction of the proceeding the parties can demand and obtain a jury to try the question of compensation, with the right to appeal to the higher courts, as in ordinary cases. *Kansas City C. & S. R. Co. v. Story*, 96 Mo. 611, 36 Am. & Eng. R. Cas. 584. And again, if the award of the commissioners should not be satisfactory to respondent, or should not be just, or should be obtained by fraud, it unquestionably has another remedy. If the defendant is insolvent, it can obtain an injunction in a court of equity till "just compensation" be made. This is the clear purport of the cases we have cited from Ohio, Louisiana, New York, Kentucky, and New Jersey. See, also, *Keating v. Korfhage*, 88 Mo. 524. In that case the contest would not be as to whether defendant had the right to the use of the track, for that was given by the city charter, but whether "just compensation" had been made or tendered for the use of the track.

The record shows that the defendant corporation did offer to pay respondent just and adequate compensation for the use of its track, as proposed; but respondent refused to agree upon the compensation payable to it, and refused to agree upon the adjustment of the amount that ought to be paid, and refused to appoint a commissioner to act with commissioners to be appointed by the defendant corporation and the mayor to make an award of such compensation. Upon that state of the record respondent is not entitled to equitable relief. "He who seeks equity must do equity." *Bisp. Eq.* p. 62, § 43. It conceded the right to the use of its track to any railroad company, and it could not obtain relief in a court of equity without alleging and proving that it made an effort to obtain, and failed to obtain, just compensation from the company seeking to use its track.

**Respondent
not entitled
to equitable
relief.**

2. The line upon which this opinion has proceeded thus far is that respondent is bound by its acceptance of the provisions of the ordinance of March 27, 1883, and the amendatory ordinance of August 2, 1887. But we find authority for another position which bars respondent's right to the relief it seeks. It is this: Where a law confers on a corporation the right to construct and operate street railroads in the streets of a city, such corporation must be considered as holding them for the public use, and subject to the power of the legislature,

State may authorize one company to use tracks of another.

when the public exigencies require it, to authorize another corporation to use the tracks of the former upon making compensation for such use. This does not grow out of the power of eminent domain or contract. It inheres in the power to regulate and control the public streets for the public convenience. In the absence of an exclusive grant, this right is, by implication, reserved to the public. In other words, in the grant of the right to lay tracks for a street railway in the streets of a city, for the public, the right to provide for the use of such track by other companies is reserved, upon making just compensation. And where the right is already in the public, the state, to exercise the right, does not proceed by virtue of the power of eminent domain. It is already the owner of the right, but it must pay for it before it can use it. When the state proceeds in the exercise of its power and right of eminent domain, it seeks to acquire the right to the use of private property. In both cases just compensation must be made, but the exercise of the power in the two cases is different. In *Covington R. Co. v. Covington & C. R. Co.*,

Same—Au-
thorities.

19 Am. Law Reg. 765, this very question was decided. The legislature of Kentucky authorized plaintiff to construct and operate a street railroad, and afterwards authorized defendant to construct a street railway also, and "to connect with and use the track of any other street railway company in said city or vicinity, upon equitable terms." COFER, C. J., speaking for the court of appeals of Kentucky, says: "It is true no person can lawfully place upon a street railway track a carriage adapted to run only on the iron rails, and use it for transporting passengers along the line, unless expressly authorized to do so. When the legislature grants to one person the right to construct a railway in a public street, and to carry passengers for hire, the grant is necessarily exclusive, so long as similar authority is not granted to another. No person would expend money to construct a railway if all others or any other might, at pleasure, put cars upon and use it to carry passengers for hire without making compensation for the use of the track. But, although such exclusive privilege be granted, why should it continue to be exclusive? The only reason that can be given is that the grantee has expended money or assumed obligations on the faith of the grant. But did it not do so with the knowledge implied, at least, that it held its right subordinate to the power and duty of the legislature to regulate and control the use of the streets in such manner as the public interest might in its judgment, from time to time, demand? There was no attempt by express words in the appellant's charter to give it exclusive right to run cars upon

the streets occupied by its track, or even upon the track itself, and we have decided that no such exclusive right exists as to the streets. As to the track placed in the street, and thereby made a part of the public highway, and which the exigencies of the public interest might demand for the use of other companies, we think the right to its exclusive use was received and held subject to the power of the legislature to permit it to be used by such other persons and corporations as it might direct, whenever, in the judgment of the legislature, a due regard to the public right to use the streets renders it necessary to do so. This conclusion is in accord with the views of Judge Redfield as expressed in his report to the Massachusetts legislature upon the nature and extent of street railway franchises, (1 Redf. R. R. pp. 315, 322;) and is supported by the opinion of the supreme court of New York in *Sixth Ave. R. Co. v. Kerr*, 45 Barb. (N. Y.), 138, and the supreme judicial court of Massachusetts in *Smith v. Boston & M. R. Co.*, 6 Allen (Mass.), 262." And to show that Chief Justice COFER did not intend this conclusion to be based on the doctrine of eminent domain, he adds: "And, in our opinion, may be sustained upon another ground equally, if not more satisfactory." This other ground, he goes on to show, is the right of eminent domain. Judge Redfield says: "A legislature may, nevertheless, allow other persons, either natural or corporate, to do a similar business in the same streets, or to do it upon the tracks of an existing company, by making compensation to another company when in their judgment the public good requires it. In the one case, the grant, being wholly independent, is understood to be made because the amount of the travel is supposed to require two modes of conveyance, and in the other the compensation is regarded as equivalent to the use." 1 Redf. R. R. 318. Streets are opened and maintained for public travel and commerce. A street railway is almost universally held to be a legitimate use of the street, and its construction imposes no additional servitude upon the soil it occupies, so as to entitle proprietors abutting on the street to compensation. *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61, and cases cited. Its tracks form a part of the street for the ordinary use of the public. It is required to construct its roadbed so as to obstruct public travel as little as possible. It has a license to put its rails down in secure and permanent form for the operation of its cars. The operation of its railway is the exercise of the public right of way over the street. The city has no power to grant the street, or a franchise in the street, for a private purpose; and the city has no power, without special authority from the state,

to grant an exclusive right to a street railway company to use the street. "It is impossible to foretell what changes in the manner of using streets may be occasioned by improvements in the modes of travel, or what modifications in the use of the modes now employed may be required by the increase in population and trade, or by the shifting of the centers of business and the routes of travel from one part of a city to another. The necessities and convenience of the public may require to-day but a single street railway, but circumstances may be so changed in half a score of years as to require many lines. From their nature and purpose for which they are used, street railways must be confined to streets or other public thoroughfares, where the space that can be occupied by them is necessarily limited. It may be impossible to meet the demands of the situation, unless new routes, made necessary since the establishment of old ones, can be extended over some portions of streets already occupied by old ones; and it may be equally impossible, without unduly interfering with other uses of the streets, equally necessary to public convenience and comfort, to give such street railway company a separate track throughout the length of its line." *Covington R. Co. v. Covington & C. R. Co.*, 19 Am. Law Reg. 765.

The city council may, in the exercise of the power delegated to the corporation in the control and regulation of streets, grant to one company the right of way over them, and afterwards grant the right of way over a part of the same railway to another company. The city council is without power to grant the exclusive use of a street which belongs to the public to a railroad company. It cannot thus deprive succeeding councils of the power of performing the duty of regulating the streets as may seem to them to be for the best interest of the public." *Canal & C. St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561, 40 Am. & Eng. R. Cas. 329. The development of rapid transit by means of street railways has been in the last decade most wonderful. "They are now almost indispensable, and their chief value to the many consists in their being in the public streets, and along the shops and places of business. They are but a means of using the public streets to a greater advantage for the very purposes for which they were laid out,—free and quick transit from one part to another. They are the best and cheapest mode yet devised, and they do not hinder the use of the street for public travel." 20 N. J. Eq. 61. The companies constructing these ways, however, have valuable property rights in them not held by the general public. They have the right of way on the tracks. They have a property right in the material of which the road is constructed. "Such material in place is as strictly private prop-

erty of the corporation as it was before it was placed, save in this only, that, having been placed in a public street, it was thereby dedicated to the ordinary use of the public; but as a railroad such material remains the private property of the company, and for such purpose it is subject to the use and control of the owner exclusively." *Kinsman St. R. Co. v. Broadway & N. St. R. Co.*, 36 Ohio St. 239, 5 Am. & Eng. R. Cas. 327. These companies also have a property right in the franchises granted which ought to be and are protected against spoliation.

Every principle of justice and equity, as well as the dictates of common honesty, demand and require that the state, or the municipalities acting under state authority, should protect the franchise and property rights of street railway companies. While this is true, however, the public has rights also which ought to be scrupulously guarded and maintained. As facilities for rapid transit increase, and as the cost of transportation decreases, travel increases, and as travel increases the demand for more routes of travel increases. Companies, having invested their means in these lines, ought to receive fair compensation for their outlay and work, and yet the state ought to see that the means of fair competition are maintained. If there is one tendency of our times more marked than another, it is the tendency to monopoly and concentration of corporate power. This tendency had become so marked in 1875 and 1876 that the people of the state in their constitution, and the people of St. Louis in their charter, provided the most stringent measures to restrict and control it. The constitution declares all railroads public highways, and the charter of the city of St. Louis provides for the joint use of the street railway tracks in the city limits by the different street railway companies. And it is the duty of the courts to construe these provisions so that, while affording ample protection to capital against arbitrary state or municipal spoliation, the rights of the public will be upheld, by limiting, at least, the monopolistic tendency, and guarantying fair competition between public carriers. If the present routes of travel from Market street to Wash avenue, along Fifth and Sixth streets, in the city of St. Louis, are not sufficient to afford accommodation to all who have occasion to use them, then it is the manifest duty of the municipality of the city to authorize those having the will and the means to provide facilities to supply the additional demand. As the situation now is the defendant corporation is unable to compete with the other street railways along Fifth and Sixth streets, between Market street and Wash avenue, for the travel on those streets. It is to the in-

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terest of those who desire to go from the southern limits of the city to a point north of Market street, or from a point north of Market street to a point south of it, to be able to do so on a street car by the payment of one fare only, and without change of cars; and it is to the interest of the present street railways along the streets named, north of Market street, to prevent the extension of the line of the defendant so as to come in competition with them. This conflict of interest is direct and sharply defined. And, to meet just such a contingency, § 6 of article 10 of the city charter gave the joint use of the street railway tracks to the street railway companies of the city, and made the municipal assembly the common arbiter between them as to the method of the use and the remedy for just compensation. The interests of the public and private capital are both preserved. The interests of the companies must yield to reasonable provisions against monopoly, and in favor of fair competition, and the interests of the public must yield so far as to provide just compensation to private capital for the use of that which is for their convenience, comfort, and material prosperity. There is no spoliation in this. The people get the use, and the companies compensation for the use.

In conclusion, we will restate what we hold to be the settled principles of law as applicable to and governing this case. (1)

**Conclusion—
Points of law
stated.**

That streets cannot be occupied for private business, and the right to construct and operate street railways in them can be granted only upon the ground that they are for the public use, and in furtherance of public convenience; and, as a corollary to this proposition, the public has the reserved right to grant the use of street railway tracks to companies other than those constructing them, upon making just compensation. (2) The city charter of St. Louis is a grant by the people of the state, and has the force and effect of a legislative grant to the municipal government within city limits. (3) By the charter the city of St. Louis has unreserved and exclusive control of the construction and operation of street railways in its streets, including the power to grant or withhold the right of way therein. (4) Any street railway company has the right to run its cars over the track of another in that city, upon payment of just compensation for the use thereof, under such rules and regulations as the municipal assembly may by ordinance prescribe; and the municipal assembly has the power to pass ordinances to enforce this right. This is not a reserved, but an affirmative, right for the public benefit, binding as well upon the city government as upon the companies. (5) By the acceptance by respondent of ordinance No. 12,477, and the

amendatory ordinance of August 2, 1887, it made its right to operate its street railways subject to the city charter adopted in 1876, and hence conceded the right of the other railways of the city to use its tracks under § 6 of article 10 of that charter. (6) Ordinance No. 12,652 was and is a valid exercise of the power of the municipal assembly of the city under article 10 of the charter, and respondent became subject and amenable to its provisions, by its acceptance of the ordinances above named. (7) If the award provided for under ordinance No. 12,652 should be unjust, or made or obtained by fraud, the party aggrieved could be relieved against it by adopting the special method provided for in the ordinance, or by application to the courts in the exercise of their general jurisdiction. (8) The defendant corporation having a right to the use of respondent's tracks under the charter and ordinances of the city, the respondent is not entitled to an injunction to restrain it from exercising that right, without alleging and proving such facts as clothe the courts with power to grant relief in the exercise of their equitable jurisdiction, and, respondent having failed to make any such allegations or proof, the injunction herein granted ought to be dissolved. It is so ordered.

MACFARLANE, J., concurs in the result. GANTT, P. J., dissents.

Use by One Street Railway Company of Tracks of Another Company.—See *Citizens Coach Co. v. Camden Horse R. Co.*, (N. J.), 1 Am. & Eng. R. Cas. 190; *Kinsman St. R. Co. v. Broadway & N. St. R. Co.*, (Ohio), 5 *Id.* 327; *Cambridge R. Co. v. Charles River St. R. Co.*, (Mass.), 23 *Id.* 62; *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, (Ind.), 43 *Id.* 234, note 252.

Conflicting Claims of Two Companies as to Right to Occupy Street—Consent of City Authorities.—A street railway company which has not procured the consent of the city authorities to use the street of a city in which it is to be operated, as is required by statute, has no standing in a court of equity to enjoin a company subsequently organized, and which has obtained such consent, from occupying the same streets designated in plaintiff's charter as the route intended to be followed. Appeal of Larimer & L. St. R. Co., (Pa., Oct. 6, 1890), 20 Atl. Rep. 570.

The fact that an ordinance granting a street railway company the exclusive right to lay its tracks on a certain street is void, as being unconstitutional, does not give another street railway company which has not obtained the consent of the city authorities for the use of such streets, a standing in court to complain of it; the ordinance being void cannot be given effect as a general ordinance inuring to the benefit of all street railway corporations. Appeal of Larimer & L. St. R. Co., (Pa., Oct. 6, 1890), 20 Atl. Rep. 570.

Consent of City Council to Construction of Electric Street Railway—Imposition of Conditions After Consent Once Granted.—The city council of the city of Grand Rapids granted an electric street railway company, as provided by statute, the right to operate its road in certain streets. The or-

dinance granting such consent provided that the poles for sustaining the electric wires should be approved by the council before they were erected. After the poles were erected, the council adopted a report approving iron poles for the district within the fire limits, and wooden ones for that without. The Act providing for the organization of street railway companies provided that the city should not revoke its consent once given, nor deprive the company of the rights and privileges conferred. *Held.* (a) that after granting such consent and approving of the poles, the city could not compel the company to provide transfer tickets without additional expense in consideration of being allowed to erect wooden poles. (b) That the council having approved the pattern of the poles as required by the ordinance, they could not be compelled by *mandamus* to do it again because of the void condition attached to the first approval. *Electric R. Co. v. Common Council of Grand Rapids*, (Mich., Dec. 24, 1890), 47 N. W. Rep. 567.

Ordinance Authorizing Extension of Street Railway—Declaration as to Company's Vested Rights.—The force of an acceptance by a street railway company of an ordinance authorizing the extension of its road is not diminished by a declaration in the same instrument that the company waived none of its vested rights under its charter. *Trenton v. Trenton Horse R. Co.*, (N. J. Ct. of Chancery, Jan., 1890), 19 Atl. Rep. 263.

Municipal Grant Exceeding Legislative Authorization—Closing up Alley.—An act authorizing municipal authorities to grant to a railroad company a permanent encroachment adjoining certain lots does not authorize a grant of right to close up a public alley running between the lots; especially where the Act declares that the company shall pay damages to the owners of the lots, no provision being made for the payment of damages to owners of property along the alley. *Georgia S. & F. R. Co. v. Harvey*, 84 Ga. 372.

KANSAS CENTRAL R. CO.

v.

BOARD OF COUNTY COM'RS OF JACKSON COUNTY.

(*Kansas Supreme Court, April 11, 1891.*)

Laying Out Highway Across Railroad Track—Damages.—Where a public highway is located and established across a railroad company's right of way, the railroad company is entitled to just compensation for all its necessary expenditures in constructing cattleguards, and such other things as are required by the statutes to be constructed by the railroad company by reason of the highway. *JOHNSTON, J.*, dissenting.

ERROR from District Court, Jackson County.

A. L. Williams, Charles Monroe and R. W. Blair, for plaintiff in error.

Rafter & Robinson, for defendant in error.

VALENTINE, J.—The present case, as made in the district court and brought to this court, is a model of brevity, containing only two pages as copied by a typewriter, and yet it contains all that is necessary to present the questions sought to be presented by the parties. It ap-
Case stated.

pears that the Kansas Central Railroad Company, which is the plaintiff in error and was the plaintiff below, is a railroad corporation of this state; that a public county road was legally laid out and established across its right of way: that at the time this was done the railroad was operated by the Union Pacific Railway Company, another duly organized railroad corporation of this state, as lessee; that no notice was ever given to the plaintiff with respect to any of the proceedings for the establishment or creation of this highway prior to its creation, though a proper notice was given to the Union Pacific Railway Company with respect thereto. Within 12 months after the location of this highway the plaintiff filed with the board of county commissioners of Jackson county, which is the defendant in error, and was the defendant below, its application for damages claimed to have been sustained by reason of the location and opening of the aforesaid road, which application was in due form, and for an amount exceeding \$150. The application was refused, and the plaintiff in due time appealed to the district court, where the case was tried before the court without a jury. "Upon the trial it was agreed by the parties that it would cost the plaintiff the sum of \$150 to put in, at said crossing, the cattle-guards, fences, crossing planks, crossing signs, and whistle posts, as required by the laws of Kansas to be put in by the railroad company at every highway crossing of a railroad in the state of Kansas; and that, if the plaintiff was entitled to recover damages, judgment should be for \$150. It was admitted by the parties on the trial that the plaintiff is a railway corporation, duly created and existing under the laws of the state of Kansas, and had lawfully condemned the right of way for and built and completed its railway at the place where this highway crosses its track prior to the location of such highway; that plaintiff's railway is operated by the Union Pacific Railway Company, a corporation duly organized, which is the lessee of the Kansas Central Railroad Company. It was also proved on the trial that no notice of the meeting of the viewers to lay out said road was ever served upon the plaintiff, or any of its agents, and that no copy of such notice was on file in the office of the clerk of Jackson county. All the facts hereinbefore stated were agreed upon by the parties at the trial." Upon these facts the court below found generally in favor of the defendant, and against the plaintiff, and rendered judgment accordingly; and the plaintiff, as plaintiff in error, brought the case to this court for review.

We think the court below erred in its findings and judgment. A railroad company's right of way is property; an

estate in land; the dominant estate securing to the railroad company the exclusive right to the occupancy, use, and control of the property as against all persons except the owner of the fee; and the paramount right to such occupancy, use, and control, even as against him. *Kansas Cent. R. Co. v. Allen*, 22 Kan. 285. In all cases where a railroad company procures its right of way under the authority of the state, in the exercise of its sovereign power of eminent domain, by what are usually termed "condemnation proceedings," the railroad company pays to the owner of the land the full value of all the land actually taken, and full and complete compensation for all the losses or damages which might result to the remainder of the owner's land, and both such value and compensation are paid by the railroad company irrespective of any benefit, or supposed benefit, which might result to the owner of the land from the construction or the operation of the railroad. *Leroy & W. R. Co. v. Ross*, 40 Kan. 598, 36 Am. & Eng. R. Cas. 653; *Interstate Con. R. T. Ry. Co. v. Simpson*, 26 Pac. Rep. 393, (just decided.) And the railroad company in paying this value and for these damages always pays largely more in the aggregate than the land actually taken is worth,—sometimes 10 or 20 times more than it is worth. And while the railroad company procures its right of way through the intervention of the state in the exercise of its sovereign power of eminent domain, and procures the same ostensibly for public purposes—and land can never be taken under such power for any other than a public purpose,—yet the railroad company alone pays for such right of way, and sometimes, as before stated, pays an amount aggregating 10 or 20 times more than the land actually taken is worth. And, although the property is taken ostensibly for a public purpose, yet all the authorities agree that the railroad company, by procuring its right of way and paying for it, procures an actual, individual, private right,—an easement,—and an estate paramount to the rights or interests of all others except the right of the state to again subject the land to be taken under the power of eminent domain. The railroad company in such a case is the dominant owner, and the owner of the fee is only a servient owner. It therefore necessarily follows that any person who should interfere with the railroad company's occupancy, use, or control of its right of way, except with the authority of the railroad company, or in subserviency to its rights, or under the sovereign power of eminent domain, would be a trespasser liable to the railroad company for all damages that might result from the trespass. And it would also seem to follow that where the interference is under the

Right and estate of company in right of way.

sovereign power of eminent domain, and the railroad company sustains substantial loss from such interference, the railroad company would be entitled to just compensation for all such loss. Certainly, whenever the railroad company's right to the exclusive occupancy, use, and control of its right of way is interfered with permanently under the power of eminent domain, something is taken from the railroad company. Of course, it is not the fee in the land that is taken, for the railroad company does not own the fee, nor is the fee under our present laws ever taken from any one under the power of eminent domain. What is taken in such a case is a portion of the railroad company's exclusive right of the occupancy, use, and control of its right of way, a part of its easement, and making it a tenant in common with some other person, corporation, or the public. This is certainly a taking of something from the railroad company which is valuable. It is a taking of a portion of the railroad company's estate for which it has paid full and ample compensation, and for the taking of which it is entitled to compensation. Where a railroad company is compelled by condemnation proceedings to surrender the use of a portion of its right of way in part to another railroad company, all the authorities agree that something is taken from the railroad company, and that just compensation should be awarded it. And nearly all the authorities agree that where the railroad company is compelled to surrender the use of a portion of its right of way in part to the public for a public highway, something is again taken from it for which it is also entitled to fair and just compensation. It is true that where a highway is established by proper authority across a railroad company's right of way without at all interfering with the company's use of its right of way, and without requiring the company to be at the expense of constructing crossings or cattleguards, or erecting fences or signs or whistle posts, or being at any other expense or suffering any substantial loss, no compensation can be allowed; but, where any real or substantial loss is suffered or damage sustained, the railroad company may have adequate compensation. In *Mills, Em. Dom.* § 33, the following language is used: "Sec. 33. The laying of a highway across a railroad track is considered an additional burden in those states where the law imposes upon the railroad company the additional expense of erecting and maintaining signs at the crossings, or erecting and maintaining cattleguards, and of flooring the crossings and keeping the planks in repair. These expenses, being directly imposed, must be paid for. In New York and Pennsylvania the laying of highways across the tracks of

Right to compensation for loss.

Same—Authorities.

railroads may be done without compensation, and the railroad company may be compelled to make the necessary excavations, embankments, and bridges to safely accommodate the highway. This authority would not include the opening of roads through grounds used for necessary buildings, yards, etc., although it was suggested in Pennsylvania that a street might be opened through depot grounds, and that the wisdom of such action could not be questioned by courts." In *Lewis, Em. Dom.* § 491, the following language is used: "In New York a statute has been held valid which authorizes the laying out of highways over the tracks of a railroad without compensation, and although it compelled the railroad company to make the necessary excavations or embankments to take the highway across. This is put upon the reserved power to repeal, alter, or amend the incorporation acts. The act in question only provided for crossing the 'track' of any railroad, and it was not held to apply to grounds taken for a station house, etc., or to tracks used simply for storing cars. Substantially the same ruling has been made in Maine, though the right to repeal, alter, or amend the charter was not reserved. In other states it is held that, in such cases, the railroad company is entitled to compensation for taking its land for a highway subject to its right to use the same for railroad purposes, and to such a sum as will enable it to make and maintain the crossing, with suitable signs, cattleguards, planking, etc. Nothing can be allowed on account of the possibility of the company being compelled to pay damages for accidents at the crossing, and evidence of what the company has paid for accidents at other crossings is incompetent. Nor can anything be allowed for the expense of ringing a bell at the crossing, nor in view of the contingency of its having to build a bridge." In *Redf. R. R.* (6th Ed.) *40, No. 13, the following language is used: "A railway corporation is entitled to damages for land taken by laying a public highway across its line, and for the expense of maintaining signs and cattleguards at the crossing, and of flooring the same, and keeping it in repair; but not for any increased liability to accidents, for increased expense of ringing the bell, or its liability to be ordered by the county commissioners to build a bridge for the highway over the track. And in assessing damages, in such a case, no supposed benefits from an increase of travel on the railway can be set off against the company." In *Pierce, R. R.* p. 193, the following language is used: "The laying out of a highway across land of a railroad company which is used for a station, or for other purposes than a right of way, is a taking of its property entitling it to compensation. So, also, it is entitled to compensation where

the highway appropriates lengthwise a part of its right of way. The laying out of a highway across the company's track, without further interference with it, is, however, not a taking of its property. The state, in authorizing the crossing, simply regulates and adjusts private rights with reference to public interests, and exercises its reserved police power. The crossing should be laid in a manner to cause as little injury as possible to the previous use, and the railroad company is entitled to compensation where the crossing is so constructed as to result in serious inconvenience." In 6 Am. & Eng. Ency. Law, pp. 554, 555, the following language is used: "When a highway is laid out by the proper authority across a railroad company's right of way, this is not such a taking of property as entitles the company to damages; but where the company is required to erect sign posts and maintain the crossing, there is in such case a taking for which compensation must be made. Where a railroad company constructs its track across a turnpike, compensation must be made to the turnpike company. The owner of property which abuts upon a highway cannot recover damages for the mere crossing of the highway by the tracks of the railroad; but, if his property is injured by change of grade made for the purpose of laying said track, he can recover. Where one railroad company is authorized to run its tracks over the land of another, this is a taking for which compensation must be made." Also, as in favor of the doctrine that railroad companies may recover compensation in such cases, see the following cases: *Old Colony & F. R. Co. v. Plymouth Co.*, 14 Gray (Mass.), 155; *Crossley v. O'Brien*, 24 Ind. 325; *Detroit, M. & T. R. Co. v. City of Detroit*, 49 Mich. 47; *Grand Rapids v. Grand Rapids & I. R. Co.*, 58 Mich. 641; *Chicago & G. T. R. Co. v. Hough*, 61 Mich. 507; *Portland & R. R. Co. v. Deering*, 78 Me. 61, 23 Am. & Eng. R. Cas. 51; *Kansas City v. Kansas City Belt R. Co.*, (decided by the supreme court of Missouri, December 1, 1890,) 14 S. W. Rep. 808. The following cases possibly hold a different view: *Railway Co. v. Sharpe*, 38 Ohio St. 150; *Railroad Co. v. President*, 5 Lans. (N. Y.), 461. In the case of *Railway Co. v. Hough*, *supra*, it was decided as follows: "Where a highway is laid out across a railroad, the railroad company is entitled to include in its damages to be paid by the township the expense of cattleguards, fencing, and other outlays to complete the approaches, besides the cost of maintaining them; and a statute which imposes this expense upon the railroad company is in conflict with the constitutional provision forbidding the taking of private property without just compensation."

The principal objections urged against the right of the

Answers to objections urged
 railroad company to receive compensation for its losses, in cases where a public highway is laid out across its track, are the following: *First*. It is claimed that the railroad company obtains its right of way through the intervention of the state, and by the exercise of the state's sovereign power of eminent domain, and therefore it must be presumed that the state reserves to itself the right, or, in other words, creates the rights, to take a portion of such right of way at any time afterwards for any other public purpose, without any compensation to the railroad company. *Second*. It is also claimed that no substantial damages are suffered by the railroad company except by its expenditures in the construction of cattleguards, fences, signs, etc.; and that the duty of constructing these things are imposed upon the railroad company under the police power of the state, and therefore that the railroad company cannot receive any compensation for their construction.

It is true the railroad company obtains its right of way under the authority of the state, and by virtue of the exercise of the sovereign power of eminent domain; but the railroad company pays for all the property which it procures, and the state pays nothing. Indeed, as a general rule, the railroad company pays vastly more than all the property which it actually receives is worth, paying not only the actual value of the land taken, but also all the damages supposed to result to that not taken; and all this without deducting anything for benefits received; and no one else pays anything. Of course, the state continues to hold the power to take the property again for some other public purpose, as for a right of way for another railroad company or for a public highway; for this power, that is, the power of eminent domain, is inherent in the state, inalienable, permanently existing, inexhaustible, and extends to all property, and the state could not deprive itself of such power by anything it might do. But there is nothing in law or in reason that would even intimate that the state would desire to retake the property for another public purpose without fair compensation to the railroad company, even if it could do so. When the state takes a portion of a railroad company's right of way for the right of way for another railroad company or for a highway, it takes it just as it takes any other private property, and the railroad company which suffers the loss should receive just compensation.

Whether the duty imposed upon the railroad company of constructing cattleguards, fences, signs, etc., can be or is imposed upon it under the police power of the state, makes no difference in this case. If the highway should not be estab-

lished across the railroad company's right of way, then it would not be necessary for any of these things to exist; but, if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is therefore the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. *Commissioners of Smith Co. v. Labore*, 37 Kan. 480, 484, *et seq.* And why should not a railroad company be entitled to compensation for losses in like cases? With reference to all the public highways existing at the time when the right of way for any railroad is procured, and which might affect the location of the railroad, the railroad company has notice, and therefore has notice with reference to what cattleguards, etc., it must construct when it constructs its railroad; and it constructs its railroad with the understanding that it must make all the necessary expenditures for the construction of such cattleguards, etc. But with respect to highways not already established when the right of way is procured, there can be no such understanding. We think a railroad company may recover, in a case like the present, for all expenditures it is required to make under the statutes by reason of the location of a highway across its right of way. With regard to notice, the notice to the Union Pacific Railway Company was no notice to the plaintiff. The judgment of the court below will be reversed, and cause remanded for further proceedings.

HORTON, C. J., concurs. JOHNSTON, J., dissents.

Laying Out Highway Across Railroad Track—Compensation to Company.—See *State ex rel. St. Paul, M. & M. R. Co. v. Shardlow*, (Minn.), 45 Am. & Eng. R. Cas. 106; *State ex rel. St. Paul, M. & M. R. Co. v. District Court*, (Minn.), 42 *Id.* 241, note 247; *State v. Chicago, B. & Q. R. Co.*, (Neb.) 42 *Id.* 248, note 253, where the cases are collected.

Service of Notice of Establishment of Road Across Track.—In Iowa, it is held that where a railroad company's ownership of a railroad track is not shown by the county transfer book, notice of a report in favor of establishing a road across such track need not be served personally on an officer or agent of the road. *State v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 10, 1890), 46 N. W. Rep. 741.

Dedication of Streets Across Railroad.—In order to establish a dedication of streets across a railroad track by adverse user, it was shown that the public travel over the railroad was sometimes by one path and sometimes by another. The city had recognized the right of the railroad company

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by stopping paving and grading at its line of road.. When a bridge was built requiring an elevation of the railroad track across all the streets mentioned, the city made no claim as to streets at the points in question. It appeared that the travel over the track had been subject to interruption by cars left standing without regard to the public. *Held*, that a dedication was not established. *Commonwealth v. Philadelphia & R. R. Co.*, 135 Pa. St. 256.

Where a railway company laid its track over a traveled street or road used by the public as a highway, which had not theretofore been legally laid out as such, and the public thereafter continued to use the crossing as a highway for many years, without interference by the railway company, which, on the contrary, kept the same in proper repair for public use, and planked the same, and built cattleguards on each side thereof, *held* sufficient evidence of a dedication thereof for public use as a highway. *St. Paul, M. & M. R. Co. v. City of Minneapolis*, 44 Minn. 149.

ROSS

v.

GEORGIA, CAROLINA & NORTHERN R. CO.

(*South Carolina Supreme Court, October 2, 1890.*)

Obstruction of Private Way by Railroad—Remedy of Owner.—The general statutes of a state prescribing the mode in which the amount of compensation to which the owner of private property may be entitled, when the same is taken under the right of eminent domain, applies to all species of property that may be so taken, including a private right of way. The only remedy of the owner of such private way, which has been obstructed by the construction of a railroad, is to proceed under such general statutes to obtain compensation, and not in an action for damages. This is so although such statutes speak generally of "lands," this term including all rights and easements growing thereout.

Same—Action for Statutory Penalty.—The owner of a private way cannot maintain an action of trespass for damages for the obstruction of such way by a railway company, where a statute prescribes a specific penalty for the obstruction by a railway company of a highway or other way, across which its road is laid.

Same—Pleading—Variance.—In an action to recover damages for the obstruction of a private way, the complaint alleged that the way was so entirely obstructed that the plaintiff was utterly unable to pass. The proof showed that the way was only partially obstructed, leaving ample room for egress. *Held*, that the variance was fatal, and that a motion for a nonsuit should have been granted.

APPEAL from Common Pleas Circuit Court of Chester County.

F. L. Glenn, for appellant.

Henry & Gage, for respondent.

McIVER, J.—The substantial allegations of the complaint

are as follows: That plaintiff, being the owner of a lot in the town of Chester, is entitled to "a private way" known as "Peace Street," 30 feet in width, as his only means of egress from his said lot into Pine street, a public highway in said town; that defendant has obstructed said private way "by erecting therein and across the same an embankment of earth from four to twelve feet high, so that the plaintiff is utterly unable, as was and is his right, to pass and repass along the said way with teams or on foot;" that the plaintiff has been damaged thereby to the amount of \$500, for which sum, together with costs, judgment is demanded. The defendant, by its answer, denies these allegations, and as a further defense says that, if the said private way has been in any way obstructed by defendant, it has been done in the construction of its railway upon its own land, in accordance with and by virtue of the powers granted by the legislature to defendant in its charter, and that plaintiff still has an unobstructed way from his lot to Pine street, provided by defendant; and it is submitted that if plaintiff has been deprived of his use of Peace street by the construction of defendant's railway, his only remedy is to have his damages assessed in the mode prescribed by statute. The testimony on the part of the plaintiff was that he had purchased from one Wylie a lot upon which he resided, which was described in the deed from said Wylie as bounded on the south by Peace street, and was so represented on a plat attached to said deed; "that Peace street, laid out 30 feet wide, was, at the time of plaintiff's purchase, and at the trial, the plaintiff's only way leading from out of the plaintiff's lot to a public way, to-wit, Pine street; that the defendant corporation constructed its roadbed along and in said Peace street, from its junction with Pine, southwestwardly to a point where it passes the southwestern corner of plaintiff's lot beginning with a fill about twelve feet high, and ending with a fill four feet high in front of plaintiff's lot; that, after the construction of the fill, Peace street was twenty-five feet wide in front of plaintiff's house and twelve feet wide at the junction with Pine street, and at most other points was twenty feet wide." At the close of the testimony on the part of the plaintiff, a motion for a nonsuit was made and refused, to which exception was duly taken. The defendant then offered testimony tending to show that the original location of the roadbed had been so changed as to leave a way 25 feet wide between the foot of defendant's embankment, and the front of plaintiff's lot, and that defendant had procured from the land owners, between plaintiff's lot and Pine street, an additional right of way, so as to give plaintiff an unobstructed outlet to Pine street, not narrower

Case stated.

at any point than 12 feet, as indicated by the diagram offered in evidence. Upon the case as thus presented, the jury were instructed, among other things, as follows: Where one person sells a lot and calls for a street as a boundary of the lot he sells, that gives the purchaser of the lot the right to use the street. * * * No corporation has the right to obstruct him in the use of it. Admitting that the railroad company had the right to cross it, or cross it diagonally, it is still, under the law of land, bound to cross it in such a manner as not to obstruct him in the use of it. If it has done so, he is entitled to your verdict: *First*. That the plaintiff is entitled to the use of P. street as a private way. Your verdict will be that he is entitled to the use of the street—to the unobstructed use of P. street; and we find that the defendant corporation has obstructed the said street, and would give the plaintiff so many dollars damages." Then, after instructing the jury as to the claim for exemplary damages—a matter not now involved in the case—the circuit judge proceeded to say: "Then, what are the actual damages? The party, it seems, was obstructed in the use of the street wholly for about a year, or perhaps a little more (though of this we do not find in the testimony as reported in the case a particle of evidence.) Furthermore, even when the street was open so that he may have the use of it, he has not the use of the street according to the width that his purchase called for. That is the testimony, and the question then is, does the narrowing of that street injure the value of his property? Will it permanently injure the value of his property? If so, then it is damaged. Anything which will permanently injure the value of his property, the damage to that property must be allowed." And, at the conclusion of the charge, these words are used: "My simple charge is that if that street is obstructed and made less convenient by the railroad, so as to injure the value of the property, the plaintiff is entitled to recover the loss in value to his property, and also for the time his road was obstructed, whatever the jury may think is right." The jury returned a verdict in the following form: "We find the plaintiff has the right to the unobstructed use of Peace street, and five (5) dollars damages in this case."

The defendant appeals upon the several grounds set out in the record, in which error is imputed to the circuit judge in the following particulars: (1) In refusing the motion for a nonsuit. (2) In not holding "that the use of a part of Peace street by the defendant in the construction of its railway was lawful and not wrongful, and that plaintiff was only entitled to have an assessment of the amount of compensation due him for the obstruction of

Grounds of
appeal.

Peace street by defendant." (3) In holding that plaintiff was entitled to any other remedy than the special proceeding provided by statute for the assessment of the amount to be paid by railway companies for rights of way. (4) In holding that a private right of way or the use thereof could not be condemned, or in any way acquired, without the consent of the owner. (5) In holding that the defendant could not, by virtue of its charter, construct its railway upon land over which plaintiff had a right of way, even though defendant had permission of the owner of the land, or owned the land itself. (6) In holding that defendant could not, for the purpose of constructing its railway, alter and change the location of Peace street, even though as good a way should be provided for those entitled to the use of Peace street. (7) "Because his honor erred in directing the jury to find in the verdict anything else than the amount of damages they might think the plaintiff entitled to for the changing and alteration of Peace street." It has been deemed necessary to make a much fuller statement of the proceedings below than is usually required, because, as it seems to me, there is some confusion as to the real nature and scope of the action. Even the circuit judge in some portions of his charge seems to have regarded it as an action to recover damages for the permanent injury done to plaintiff's own property by the construction of the railroad over and along the private right of way claimed by him in what is called "Peace street," although, strictly speaking, it is not a street, but simply a private way, as is conceded on both sides. But, from other remarks made in the charge, it would seem that he regarded it as an ordinary action, such as was formerly designated as an action on the case, to recover damages for the obstruction of a private way. In one view of the case, it would become extremely important to determine whether the present action belonged to the former or to the latter class; for, if it belonged to the former, then the damages recovered would be a satisfaction of the injury complained of for all time to come, whereas, if it belongs to the latter class, then the defendant would be liable to repeated actions, with ever increasing damages, as a means of forcing the removal of the nuisance. But, under the view which I take of the case, this question becomes immaterial. It seems to me that when the legislature granted a charter to the defendant company, authorizing it to construct a railway between the points therein designated, it must be regarded, as having conferred upon said company the right to take and condemn such lands and rights of way as might be necessary to effect the purpose, and also the right to cross or run along

Right to
maintain
action for
damages.

any highway or other way which might be encountered on the route selected between the designated termini. This is,

Remedy is under eminent domain statutes. by virtue of the right of eminent domain, retained by the state, the only limitation upon which is found in § 23, art. 1, of the constitution forbidding the taking of private property "for public use, or for the use of corporations, or for private use, without

the consent of the owner, or a just compensation being made therefor." In the thirteenth section of the charter of the defendant company (Act 1886, 19 St. 697) it is provided "that this company shall enjoy the benefits, and be subject to the provisions, of §§ 1550-1561, inclusive, of chapter 40 of the General Statutes of South Carolina, with respect to the manner of acquiring lands, or the right of way over lands required by it." Now, it will be observed that these sections of the General Statutes just referred to do not purport to confer the right to take or condemn the property of the citizen for the construction of a railway, or other structure of like kind, under the right of eminent domain, for this is conferred by the charter of the company claiming such right, and these sections only purport to prescribe the manner in which this is to be done, and the mode by which the amount of compensation is to be ascertained. Hence, while these sections do not, in express terms, refer to the taking or condemnation of a private right of way, but only speak generally of "lands," yet it seems to me that the obvious intention was to include in the term "lands" all rights or easements growing thereout. Any other construction would inevitably lead either to the conclusion that the legislature did not intend to confer the right to take or condemn a private right of way for the construction of a railway, or that they intentionally provided no mode by which the owner of such private right of way could obtain compensation for the taking of his property. The former is so palpably absurd in its results as to forbid its adoption; for, if the right to take or condemn a private way for the construction of a railroad has not been conferred, then it follows that, when a railway company in the construction of its road reaches a private way, it must stop until it can obtain the consent of the owner of such right of way, and thus a great public enterprise may be absolutely defeated by the obstinacy of some perverse individual. The idea that land—the freehold itself—may be taken under the right of eminent domain, and yet a mere easement growing out of or appurtenant to the land cannot be, seems too extraordinary—to use no harsher term—to admit of its adoption. So, too, I cannot think that the legislature would be so grossly unjust, and so regardless of its constitutional obligations, as to omit intention-

ally any provision for the assessment of compensation to the owner of a private right of way taken or condemned for the use of a corporation. It seems to me, therefore, that the provisions contained in §§ 1550-1561, prescribing the mode in which the amount of compensation to which the owner of private property may be entitled, when the same is taken under the right of eminent domain, applies to all species of property that may be so taken. If this be so, then it seems to be conceded that the plaintiff's only remedy was by a proceeding under the statute to obtain compensation, and hence the present action cannot be sustained. The motion for non-suit should, therefore, have been granted.

But, even if I am in error in this view, I do not see how the present action can be sustained. The circuit judge seemed to think that, as no provision had been made by statute, whereby the plaintiff could obtain redress for the injury alleged to have been done him, he was entitled, "under the general law of the land," to maintain this action for damages. Now, even if it be assumed that the plaintiff could not, under the provisions of sections 1550-1561 of the General Statutes, obtain compensation for the violation of his legal rights, yet there is a provision in the same chapter of the General Statutes which does afford him a remedy, and hence there is no necessity for his resort to "the general law of the land." Section 1531 of the General Statutes is in these words: "When a railroad is laid out across a highway *or other way*, it shall be constructed so as not to obstruct the same." Now, surely the words which I have italicized are broad enough to cover a private way; and the necessary inference from the terms of the section is that, while it is not unlawful to lay out a railroad across a private way, yet it is unlawful to lay it out in such a manner as to obstruct the same. Now, as there is no specific penalty prescribed in that section for the doing of the unlawful act there forbidden, we must look to section 1539 of the same chapter, where a specific penalty is prescribed for doing any unlawful act prohibited by that chapter, "where no specific penalty is hereinbefore already provided;" so that, under this view of the case, it is quite clear that the plaintiff's remedy (if entitled to any) was by an action for the penalty prescribed by section 1539, and there was no warrant for an appeal to "the general law of the land:" and this we have held distinctly in the case of *Railroad Com'rs v. Columbia & G. R. Co.*, 26 S. C. 353, 30 Am. & Eng. R. Cas. 177.

Remedy by
action for
penalty.

There is also another ground upon which the motion for non-suit might have been granted. Referring to but without

repeating here the precise language of the complaint set out above, the plaintiff's cause of action seems to be that defendant obstructed his right of way by erecting therein and across the same an embankment of earth from 4 to 12 feet high, so that plaintiff is utterly unable to pass and repass along said way. Now, there is not only an utter absence of any testimony to sustain this allegation, but, on the contrary, plaintiff's own testimony, as set out in the case, shows that it is not true. According to his own statement, after the road was constructed, his right of way in front of his own lot was 25 feet wide, and at no point was it narrower than 12 feet, and this it would seem left him ample means of egress from his lot to the public streets of the town of Chester. Such a variance between the *allegata* and *probata* would seem to be fatal. It seems to me, therefore, that the judgment of this court should be that the judgment of the circuit court be reversed, and that the complaint be dismissed; and this being the opinion of the majority of this court, it is so adjudged.

MCGOWAN, J., concurs.

SIMPSON, C. J., (*dissenting*).—The respondent, some time in 1886, purchased a lot in the town of Chester from one W. Gill Wylie. The deed from Wylie called for Peace street as a southern boundary. This seems to have been a private way 30 feet wide, running along the southern boundary of this lot and other lots into Pine street, which is a public street of the town. Some time in 1888, the defendant appellant, in constructing its track and building its road through the town of Chester, entered upon Peace street at its junction with Pine street, and running along it, by lessening its width, and erecting embankments thereon, as it is alleged, obstructed it, to the damage of the plaintiff, and the action below was brought to recover said damages. The principal defense set up was that, if plaintiff had suffered any damages for which he was entitled to recover, his remedy was to have said damages assessed, as provided by the statute in such cases; and therefore that the present action could in no event be maintained. And upon this ground a motion for a non-suit was made by the defendant at the close of plaintiff's testimony, which being overruled, the case proceeded to a verdict for the plaintiff as follows, to-wit: "We find the plaintiff has the right to the unobstructed use of Peace street, and five (\$5) dollars damages in this case." His honor the trial judge, in addition to overruling the motion for non-suit, charged the jury that the injury complained

of, if any, could not be redressed under the act in reference to condemnation and assessment of lands by railroads, etc., and for railroad purposes; but that the court of common pleas was the only jurisdiction in which relief in such cases could be found, and that the action below was the proper and legal mode of seeking such relief. The exceptions—there being several—allege error in different phraseology to this ruling, the appellant contending that plaintiff's cause of action, if he had any, fell under the act aforesaid, which being statutory, the plaintiff was confined to the mode of procedure therein provided; so the question in the case is, whether or not the act aforesaid was intended to apply to causes of action like that below. Now, while it is true that the act in question supplies to railroad corporations the necessary machinery for acquiring right of ways over the lands of others; and also lots for the erection of depots, station houses, etc., yet there is nothing in said act which provides for the transfer, or rather the breaking up, of ways, either public or private. On the contrary, section 1531 seems to contemplate that said ways shall not be seriously interfered with. That section provides that, when a railroad is laid out across a highway or other way, it shall be constructed so as not to obstruct the same; thus evidently intending that there should be no injury done to such ways, or at least no such injury as would require an assessment of the value of the way, under the railroad act as to condemnation, etc. The right to cross and to run along said ways, as we suppose, is given, but there must be no obstruction. When, then, an obstruction is made, it is of course illegal, and, if injury results therefrom, the party injured is entitled to redress, and, not being authorized to seek his redress under the railroad act, he must of course apply to the court of common pleas. The first five exceptions are disposed of by what has been said above. The sixth his honor did not charge; on the contrary, he said, in substance, that such ways might be changed or altered if as good a way was left. This, as it seems to us, at least, was included in the charge where his honor said, "Admitting the railroad company had the right to cross, etc., yet it must be done in such manner as not to obstruct. In other words, a sufficient way must be left or provided. The seventh fails to raise a legal question. We think the term "other way" in the statute is sufficiently broad to cover Peace street here. I cannot concur in the majority opinion.

Remedy by
action for
damages.

LAMM

v.

CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA R. CO.

(Minnesota Supreme Court, Dec. 17, 1890.)

Trespass on Contiguous Lots—Assessment of Damages.—Where a single trespass is committed on two contiguous lots of the plaintiff, it is proper to assess the damages to both lots together, although they may not have been so used by the owner in connection with each other that they would be considered one tract in condemnation proceedings by a railway company.

Railroad in Street—Consent of Authorities—Private Rights of City Councilman.—An act of the legislature, or an ordinance of a city, authorizing a railway company to construct its road in a public street, gives it the right to do so only as against the public, but not as against owners of the abutting premises having private property rights in the street. And where a member of a city council votes for such an ordinance, his assent is referable only to the public easement, and not to his own private rights of property in the street.

A Conveyance of Lots to Railway Company, "for Railway Purposes" is not to be construed as covenanting that the street on which the lots abut, to the center line thereof, may be used for such purposes, while it remains a street, so as to interfere with any easement constituting a private right of property which the grantor may have therein, appurtenant to other property abutting on the same street.

Continuing Trespass—Successive Suits.—Where a railway company unlawfully constructs its road in a public street so as to interfere with the private rights of abutters, it constitutes a continuing trespass, for which successive suits for damages may be brought, so long as the trespass is continued, until the occupation ripens into title by prescription.

Vacation of Streets—Rights of Abutting Owner.—Where a public street is lawfully vacated, the owner of abutting property holds the fee of the former street, presumably to the center line, discharged from all easements in favor of either the public or the owners of other property abutting on the street.

Same—Authority to Vacate.—Under the charter of the city of Mankato, no street can be vacated unless authorized by the legal voters of the city.

Construction of Railroad in Street—Compensation to Abutter.—*Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 36 Am. & Eng. R. Cas. 7, followed, holding that the owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee in the street, an easement in the street to its full width, in front of this lot, for the purposes of access, light, and air, which constitutes property, and cannot be taken from him for public use without compensation.

Same—In Estimating Damages to a lot caused by the construction and maintenance of a railway in the street in front of the premises, but beyond the center line thereof, only such injuries to the property should be considered as proximately result from interference with the appurtenant easement for purposes of access, light, and air which the owner has in that part of the street.

APPEAL from District Court, Blue Earth County.

James H. Howe and *Lorin Cray*, for appellants.

J. M. Burlingame, for respondent.

MITCHELL, J.—The main facts in this case are the same as in *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 36 Am. & Eng. R. Cas. 7, upon the doctrine of which case, plaintiff bases his right of recovery. Case stated. Fourth street in the city of Mankato is, and ever since prior to 1868 has been, as plaintiff claims, a public street 80 feet wide, running northerly and southerly through the city. The plaintiff is, and for more than six years before the commencement of this action had been, the owner and in possession of two contiguous lots, (7 and 8 in block 40) in the city of Mankato, and abutting on the westerly side of Fourth street. The defendant's predecessor and grantor, the St. Paul & Sioux City Railway Company, in 1868, constructed the main and certain side tracks of their railway (an ordinary commercial one) upon and along the easterly half of this street, in front of plaintiff's lots; no part of the same, however, being laid west of the center line of the street. In 1881 the defendant succeeded to the rights of the old company, and has ever since maintained and operated these tracks for the purposes of their road, causing, as is alleged, damage and injury to plaintiff's property by reason of ashes, smoke, and cinders cast upon it by passing engines, and by the noises and jarring of passing trains, to the great annoyance and discomfort of plaintiff and his tenants.

This is in the nature of an action in trespass to recover damages for these injuries to the property. There is no evidence that the injuries complained of are due to any improper construction or operation of the road, but, as already suggested, plaintiff rests his right to recover upon the doctrine of the *Adams Case*, that the owner of a lot abutting on a public street in a city has, as appurtenant to the lot, and independent of the ownership of the fee in the street, an easement in the street to its full width in front of his lot, for access, and the admission of light and air, which constitutes property which cannot be taken from him without compensation. It is impracticable, as well as unnecessary, to follow counsel through their elaborate discussion of their 81 assignments of error. We shall simply consider, in our own order, certain questions, the determination of which will dispose of every substantial question raised by the record.

1. But one exception is taken to the evidence of plaintiff's title to the lots referred to. It is claimed that it was error to admit a judge's town site deed to plaintiff's remote grantor without its being first shown that the judge had complied with all the requirements of statute, and that the grantee was the occupant entitled to the deed. This was unnecessary. It is a case where

Evidence—
Judge's town
site deed.

the presumption in favor of official acts obtains that the judge did his duty in all respects. Moreover, the defendant, being a stranger to the title, was not in a position to raise the question. *Taylor v. Winona & St. P. R. Co.* (Minn.), 47 N. W. Rep. 453 (October term, 1890.)

2. It is further claimed that there was no evidence that defendant's use of the street was unlawful; that its possession will be presumed to be lawful until the contrary appears; and that the burden was on the plaintiff to prove that it was wrongful. This proposition is sound law, but inapplicable to the facts. Plaintiff sufficiently proved that this land had been laid out, dedicated, and used as a public street in which he would have an easement appurtenant to his abutting lots. If the street had been vacated, or if defendant had by grant or otherwise, acquired an easement in it giving it a right to use for railway purposes, the burden of proving the fact was on defendant. The plaintiff was no more required in this case than he would be in an action of ejectment to prove a negative by showing that the title established by a chain of record evidence had not been divested.

3. It is also claimed that it was error to prove and assess the damages to plaintiff's two lots together. If this was a condemnation proceeding to ascertain plaintiff's compensation for taking a part of one of these lots, it may be that within the decisions of this court the lots would be considered two tracts, so that damages to the lot not taken could not be included in the award. All the cases cited by counsel are of this kind. But this is an action for a single, although continuing trespass, resulting in damage to both lots. Had the trespass been committed by a natural person on the lots themselves, there could have been no doubt of the propriety of assessing the entire damage to the whole property, in gross. The facts that the trespass was committed by a railway company, and in the street abutting the lots, do not change the rule.

4. A few words seem necessary to remove an apparent misapprehension of counsel as to the effect of acts of the legislature, or ordinances of cities, authorizing a railway company to construct its road on public highways or streets. These relate solely to the public easement. Such acts give the right as against the public merely. But neither the state nor any of its municipal corporations can grant private property, even for public uses, in this way. *Gray v. First Div. St. P. & P. R. Co.*, 13 Minn. 315, (Gil. 289); *Kaiser v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 149. And, on the same principle, evidence that

Burden not on plaintiff to prove wrongful use.

Assessment of damages to two lots.

Consent of authorities—Private rights of councilmen.

plaintiff, as a member of the city council, voted for an ordinance authorizing defendant's grantor to construct and operate its road on this street would have no sort of tendency to prove that plaintiff released any of his private property rights in the street, or that he consented to these rights being taken away or interfered with without payment of compensation. His official vote for the ordinance is referable solely to the public easement.

5. It is also assigned as error that the court excluded a deed dated June, 1868, from plaintiff to defendant's predecessor of the two lots abutting on the east side of the street, and immediately opposite plaintiff's lots, which contained a recital to the effect that the lots were deeded "for railway purposes and depot grounds." It is argued that this deed conveyed to the grantee the fee to the middle of the street, subject to the public easement, and, as against the grantor, gave the grantee the right to use and occupy the land to the centre of the street for railway purposes. Had the deed contained an express stipulation or covenant to that effect, a quite different question would have arisen. But a deed of the lots, although "for railway purposes and depot grounds," cannot be construed as covenanting that the grantee might use the street, so long as it remained such, for such purposes, so as to take away or interfere with the enjoyment of such easements as the grantor might have in it, appurtenant to other abutting property owned by him. In so far as the deed was offered for the purpose suggested, it was properly excluded.

Conveyance of
lots for "rail-
way pur-
poses."

6. It is urged with much earnestness by the general solicitor of the defendant company in his brief that, if plaintiff or his grantor ever had any cause of action, it accrued against the old St. Paul & Sioux City Railway Company, in 1868, when it built these tracks in the street; that the railway is a permanent and lawful structure which must remain; that as soon as these tracks were built, a right of recovery (if any ever existed) immediately accrued, once for all, for all damages, present or prospective, to the property; and consequently that the cause of action has long since been barred, and that, as to the lot which he (plaintiff) subsequently bought, he purchased it subject to defendant's easement or right to maintain its tracks where they were, and that the right of action for damages which had already accrued to his grantor did not pass by the deed to plaintiff. It needs the citation of no authorities to sustain so plain a proposition as that a cause of action for damages for trespass to real estate will not pass by a subsequent conveyance of the land, or that, if property is subject

Continuing
trespass—Suc-
cessive units.

to an easement, a grantee of the land will take it subject to the easement. But it seems to us that counsel's position is based upon an entire misconception of the nature of the acts here complained of, as well as of this action. If the use and occupation of this street constituted an unlawful interference with the property rights of plaintiff's grantor, then, as against him, it had no easement, but was a mere trespasser, and it would not be claimed that a purchaser of land, upon which an intruder was then engaged in committing trespass, bought subject to the right of the intruder to continue his trespass. If the use and occupation of this street were unlawful, it was a continuing trespass, for which repeated actions to recover damages will lie as long as the trespass is continued, until the occupancy ripens into title by prescription. The distinction between an action for trespass and a proceeding to ascertain the compensation to be paid for the permanent taking of property for railway purposes must be kept in mind. This is the former, and in it only such damages can be recovered as had accrued at the date of the commencement of the action. The payment of the verdict or judgment would give defendant no right to continue its use of the street; and if, instead of plaintiffs bringing this action, the defendant had instituted condemnation proceedings, the award of compensation would not have included damages for prior trespasses, nor would the payment of the award be a bar to an action for such damages. *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215, (Gil. 188;) *Hursh v. First Div. St. P. & P. R. Co.*, 17 Minn. 439, (Gil. 417;) *Adams v. Hastings & D. R. Co.*, 18 Minn. 260, (Gil. 236;) *Brakken v. Minneapolis & St. L. R. Co.*, 29 Minn. 41, 7 Am. & Eng. R. Cas. 593. The cases cited by counsel, notably those from Illinois and Wisconsin, are not at all analogous. They will, we think, all be found to be cases where the railroad or other company had a lawful right permanently to maintain its road or other structure as it then was, subject only to the duty to pay the injured land-owner compensation; the action, whatever its form, being in effect a substitute for condemnation proceedings, its object being to recover compensation for the permanent appropriation of property already taken. That this was really the situation in the case of *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 27 Am. & Eng. R. Cas. 415, is apparent, especially from the separate opinion of Justice SCHOLFIELD. The same is true of *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 178, 20 Am. & Eng. R. Cas. 413, in which state they have a statute authorizing the landowner to initiate proceedings to have his compensation ascertained for property taken for railway purposes, and under which the courts have held that, where the owner by consent permits a

railway company to enter and construct its road on his land, he waives his former remedy by action for trespass, and is relegated to his remedy under the statute referred to. But in *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 184, where the road was built on land without the consent of the owner, and he erected (as it was held he might) to sue in trespass instead of proceeding under the statute to have compensation assessed for a permanent taking of the property, the court very clearly makes the distinction between the two proceedings, holding that the acts of the railway company constituted a continuing trespass.

7. We are asked to reconsider and overrule our decision in the *Adams Case*. It is urged that it is against the great weight of authority, that a contrary view had been acted on so long in this state as to have become a practical rule of property, and that the rule laid down by us is resulting in serious consequences by way of unsettling titles to much railway property, and stirring up much litigation over stale claims for damages. It is also suggested that our decision was based largely upon the authority of the *Elevated Railway Cases* in New York, the doctrine of which has since been held by the same court in *Forbes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 43 Am. & Eng. R. Cas. 137, to be inapplicable to "surface roads." The decision in the *Adams Case* was the deliberate judgment of this court pronounced after exhaustive arguments by able counsel and the most thorough and careful consideration of the case of which we were capable, and we have not since seen any reason for changing our opinion as then deliberately announced. The doctrine of that case must therefore be considered as the settled law of this state upon all questions involved therein, or which logically come within the principles there determined. Although its doctrine may be a step in advance of the general current of authorities, yet we believe it to be sound in principle, and eminently equitable in practice. The only serious objection to it (and we recognize its force) is the difficulty in applying the rule adopted by us as to the measure of damages. The temporary evils resulting from the adoption of the rule by way of inciting litigation or unsettling titles are, we think, much overestimated, and will soon pass away. We cited the *Elevated Railway Cases* because of what we deemed the inherent force and soundness of the reasoning of the opinions of the court, although we were then, and still are, unable to see how it was consistent with the doctrine of that court, announced in other cases, that the legislature had the right to authorize the construction of a railroad on a street without requiring the railway company to pay compensation to

Adams Case
affirmed.

the owners of abutting lands, provided they did not own the fee in the street. For if the abutting owner, independently of the ownership of the fee in the street, has an easement in the street in front of his lot to the full width of it for the purposes of access, light, and air, which is property, and cannot be taken from him without compensation, it is difficult for us to see what difference it makes whether the easement is taken away or its enjoyment interfered with by a railroad constructed and operated on the surface of the ground, or at an elevation above it. As the Forbes Case is but the adherence of the court to its former decisions as to "surface" roads, it does not render the reasoning in the Elevated Railway Cases any less persuasive to our minds than it was when we considered them in connection with the Adams Case.

8. Upon the trial the defendant offered to prove that it was, and for more than eight years had been, the owner of the two lots immediately opposite plaintiff's lots, and abutting on the east upon the same part of Fourth street; also the provisions of the charter of the city of Mankato (Sp. Laws 1868, chap. 27, subc. 6, § 1) in regard to the vacation of streets; also an ordinance of the city passed in July, 1868, vacating certain streets, among others so much of Fourth street as lies east of the center line thereof, and between Plum and Elm streets, which includes that part in front of plaintiff's premises, and, in connection with this ordinance, offered to prove that it was duly submitted to and ratified by a vote of the legal voters of the city of Mankato at the time of its enactment. Each and every part of this evidence was excluded by the court. We have examined the record with care to ascertain, if possible, upon what ground so learned a court excluded evidence so clearly admissible, as it seems to us. It may be that some good reason was apparent on the trial to the learned judge; but, if so, we have failed to discover it, and counsel for plaintiff have not pointed it out. The materiality and relevancy of the facts offered to be proved are very apparent; for, if the east half of Fourth street was legally vacated, it was no longer a public highway, and neither the public nor plaintiff any longer had any easements in it. The defendant, as the owner of the lots abutting on it, thereafter held the fee of that part of the former street in front of its premises to the center line, unincumbered by any such easements, and had the same right to use and occupy it as any part of its lots outside the former street line. For this error, if no other, a new trial must be granted. Upon the argument, counsel discussed the question whether it was necessary, under the city charter, that an ordinance vacating a street should be submitted to and ap-

Vacation of
street—Evi-
dence.

proved by the legal voters of the city. As a new trial must be had, in which this question may again arise, it should be considered at this time. The charter gives to the city council the care, supervision, and control of all streets within the city, and power to lay out, open, alter, and vacate public squares, highways, streets, etc., and widen and straighten the same: "provided that no right, title, or interest in or to any street, levee, park, public ground, or square in said city shall be granted, conveyed, released, or discharged by the common council of said city, unless the same shall be submitted to a vote of the legal voters of said city, and receive a majority of said voters present and voting," etc. An ordinance vacating a street, and thus giving up and releasing the entire interest of the public in it, is certainly as much within the reason of this proviso as one surrendering or releasing only a part of such interest. Such an ordinance would clearly be within the mischief intended to be guarded against. As the greater includes the less, we think such an ordinance must be submitted to and approved by the legal voters.

9. Upon the trial, the judge, in accordance with the rule laid down in the Adams Case, both in the admission of evidence and his instructions to the jury, held that plaintiff's recovery should be limited to the damages caused by maintaining and operating the railroad in front of his lots, and could not include any that might have accrued from maintaining or operating it on other parts of the street. He did not, however, limit the recovery to such damages as resulted from interference with access to the premises, or with the admission and circulation of air and light, but allowed to be taken into account all damages to the premises resulting generally from the maintenance and operation of the road in the street in front of them, as for example, noise and jarring from passing trains, which discommoded and annoyed the occupants of the premises, and thus rendered their use less valuable. This is also assigned as error. In the Lahr Case, 104 N. Y. 268, the majority of the court did not limit the recovery, as this court did in the Adams Case, to damages caused by operating the road on that part of the street immediately in front of the premises, thereby avoiding the practical difficulty, under our rule, of distinguishing between damages resulting from the operation of the road in front of the premises and those resulting from its operation on either side of them. They held that the road and its intended use could not be dissected and separated, but must be considered in its entirety in considering its effect upon the property of the abutter; that, however the damage may be inflicted, provided it be effected by an unlawful use of the street,

Elements of
damages.

it constitutes a trespass, rendering the wrongdoer liable for the consequences of his acts. And while they predicated, as we did, the right of the abutter to recover upon the proposition that he had an easement in the street to its full width for ingress and egress to and from his premises, and also for the free passage and circulation of light and air through and over such street, for the benefit of property situated thereon, yet they did not limit the right of recovery to damages resulting from interference with access, light, and air, but extended it to any damages resulting from the unlawful maintenance and operation of the road in the street. At least, we so understand their language. The minority of the court were of opinion that, according to the fair import of the grounds upon which the Story Case, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, was decided, the abutting owners were only entitled to damages for the construction and operation of the railway in front of their premises, resulting from the taking or destruction of their street easements of light, air, and access; and that they could not recover for anything done by the railway in the street except as it deprives them of the easements mentioned. In the Adams Case we adopted the limitation as to place, viz., "in front of the premises," but the question as to the elements of damage to be taken into account, and whether to be limited to such only as arise from interference with the easements of access, light, and air, was not considered or passed upon. The whole theory, however, upon which the opinion proceeds leads logically and necessarily, as seems to us, to the conclusion that a recovery can only be had for damages resulting from the destruction of or interference with the easements of access, light, and air. The very groundwork upon which the right of recovery is based is that the abutting owner has, in the opposite half of the street, not the fee, but an easement for access, light, and air for the benefit of his premises. These are all the rights in the nature of private property which he has in that part of the street and consequently they are the only property rights which the defendant has trespassed upon; and, if so, it would seem logically to follow that this is all for which they are liable to respond to him in damages. We are not disposed to extend the scope of the decision in the Adams Case beyond its fair import, and we think that, both upon principle and considerations of policy, a recovery in such cases should be limited to damages resulting to the premises from interference with access, light, and air. It follows that some of the elements of damage which the trial court permitted the jury to consider, such as the jarring of the premises, and noises made by passing trains, causing annoyance and discomfort to the

occupants, ought to have been excluded. Order reversed.

VANDEBURGH, J.—I concur in the result.

Right of Abutting Owners to Compensation for Construction of Steam Railroads in Streets.—See *Forbes v. Rome, W. & O. R. Co.* (N. Y.), 43 Am. & Eng. R. Cas. 137; *Jackson v. Chicago, S. F. & C. R. Co.* (C. C.), 43 *Id.* 145; *Trustees of First Cong. Church v. Milwaukee & L. W. R. Co.* (Wis.), 43 *Id.* 182; *Ottlenot v. New York* (N. Y.), 43 *Id.* 129; *McQuaid v. Portland & V. R. Co.* (Or.), 40 *Id.* 308, note 320.

Action by Abutter for Damages—Extent to which Street must be Obstructed.—To entitle an abutting lotowner to recover damages for locating a line of railroad, under the authority of the city council, in one of the streets of a city, there must be a practical obstruction of the street in front of his premises, so as to virtually deprive him of ingress to and egress from his property. *Kansas, N. & D. R. Co. v. Mahler*, (Kansas, March 7, 1891), 26 Pac. Rep. 23.

Same—Impairing Access to Premises—Sufficiency of Complaint to Sustain Private Action.—In *Lakkie v. Chicago, St. P., M. & O. R. Co.*, 44 Minn. 438, it was held that the complaint alleging the obstruction of public streets by the construction of a railroad therein was not sufficient to show that the plaintiff's access to his premises (not adjacent to such obstruction), was thereby so impaired as to entitle him to maintain a private action therefor.

Nuisance Caused by Construction of Embankment in Highway—Damages for Depreciation of Property.—In *Rosenthal v. Taylor, B. & H. R. Co.*, (Texas Sup. Ct., Jan. 23, 1891), 15 S. W. Rep. 268, it was held that where a railroad company has constructed an embankment in a street in front of plaintiff's house so as to cause an accumulation of surface water which remains through a period of stagnation, and where the company has refused to drain the water off, it is not error to treat the nuisance as a permanent one, and to give damages for the depreciation of the property. The court said: "As to the measure of damages in such cases, the authorities are not altogether in accord. Since in most cases a nuisance may be abated by the injured party, and since the wrongdoers may voluntarily remedy the wrong by removing it, the general rule seems to be that ordinarily the party damaged must bring his action for such damages as have accrued up to the institution of the suit, and cannot recover for any prospective injury. That rule has been adopted in a case very similar to this. *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190. But there are other cases which announce a contrary doctrine, and we think with the better reason. *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 241; *Kemper v. Louisville*, 14 Bush (Ky.), 87; *Seely v. Alden*, 61 Pa. St. 302; *Troy v. Cheshire R. Co.*, 23 N. H. 102; *Finley v. Hershey*, 41 Iowa, 389; *Fowle v. New Haven & N. Co.*, 112 Mass. 338. In the case last cited the court say: 'The case at bar is not to be treated in this respect as an action for an abatable nuisance. More accurately, it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. If it results from a cause which is either permanent in its character or which is treated as permanent by the parties, it is proper that the entire damage should be assessed with reference to the past and probable future injury.' The language quoted is peculiarly applicable to this case. The controlling rule in actions for injuries resulting from similar nuisances would seem to be to adopt in each case that increase of damages which is calculated to ascertain in the most certain and satisfactory manner the compensation to which the plaintiff is entitled. When the injury is liable to occur only at long intervals, or when

the nuisance is likely to be removed by any agency, the damages which have accrued only up to the time of the action will be allowed; but if the nuisance is permanent, and the injury constantly and regularly recurs, then the whole damage may be recovered at once. In a case like this the resulting depreciation in the value of the property is the safest measure of compensation. Here it may be inferred from the evidence that the injury recurs upon each considerable rainfall, and continues during a stage of offensive stagnation until the water evaporates. The defendant seems to have treated the work as permanent, since they have failed, upon application, to make a culvert for the passage of the water; and we are of opinion the depreciation in the value of plaintiff's property is the most certain measure of his damages for the injury."

Estoppel of Party Contracting to Obtain Right of Way Through Street to Maintain Action for Damages to His Abutting Property.—The plaintiffs contracted to procure for the defendant railroad company the right of way of the company along the street of a town; that is, they were to obtain the consent of the authorities of the corporation. *Held*, that such contract did not admit of the construction that plaintiffs were both to procure the consent of the authorities, and to secure to the defendant immunity from the payment of damages to persons owning property abutting on streets along which the right of way should be established. Accordingly the plaintiffs were not estopped to claim damages for injury to property owned by them abutting on such street for a depreciation resulting from noise, smoke, etc., created by passing trains, and for injuries caused by the obstruction of surface water which became stagnant and offensive and constituted a nuisance. *Rosenthal v. Taylor, B. & H. R. Co.*, (Texas Sup. Ct., Jan. 23, 1891), 15 S. W. Rep. 268.

Action by Abutter Who was not in Possession when Injury Occurred—Constructive Possession through Tenant.—In an action brought to recover damages under § 9 of article 3 of the constitution, as compensation for permanent injury to real estate by the construction of a railroad upon a street adjacent to such property, it is proper for the owner to bring an action for trespass on the case, and he may count for permanent damages, and recover the same according to the evidence, although when the injury occurred, he was not in the actual occupancy of the property, but was in constructive possession of the same through his tenant under a lease. *Fox v. Baltimore & O. R. Co.*, (W. Va., Dec. 12, 1890), 12 S. E. Rep. 758.

Same—Appeal.—In *Post v. Manhattan R. Co.*, (New York Ct. of App., Dec. 16, 1890), 26 N. E. Rep. 14, it was held that the objection that an action for damages to the rental value of plaintiff's real property by the erection of a street railway in front thereof cannot be maintained, for the reason that during the term for which damages are claimed, plaintiff was not in possession of the premises, but that they were in possession of tenants under him, cannot be raised for the first time on appeal.

Right of Action by Abutter for Injury to Land in Ancestor's Lifetime.—Certain land descended to testator as the sole heir of intestate. Before the settlement of intestate's estate, testator died, devising the land to plaintiff, and making her residuary legatee. After the settlement of the administrator's accounts, but before the settlement of the executor's accounts, plaintiff commenced an action for damages to the land, resulting from the impairment of the appurtenant easements of light, air, and access in the street. *Held*, that she could not recover for damages sustained prior to testator's death, as the right of action therefor accrued to the owner of the premises on the happening of the injury, and passed as a personal asset to the administrator for the injuries during intestate's life, and to the executor for the injuries during testator's life. *Griswold v. Metropolitan El. R. Co.*, 122 N. Y. 102.

Parties to Action for Construction of Railroad in Street—Heirs of Co-tenant.—In *Shepard v. Manhattan R. Co.*, 117 N. Y. 442, it appeared that after the construction of an elevated railroad, the maintenance of which it was sought to enjoin, a co-tenant of property abutting on the street died. *Held*, that the heirs of such co-tenant "had an interest in the subject of the action" within the meaning of the Code of Civil Procedure, § 446, and were necessary parties to an action to restrain the operation and maintenance of the road, and for damages; and the failure to join them would be a defect available by a demurrer. *Held*, also, that the administratrix of the deceased co-tenant was a proper party plaintiff, she being entitled to receive damages sustained by her intestate to his property up to the time of his death.

Railroad Embankment in Highway as a Nuisance.—An embankment constructed by a railroad company with proper care, and skill, after it has complied with statutory provisions, and has obtained the right of way through the lands, is not a nuisance; but, if it is constructed along a highway, not within the corporate limits of any city or town, and which has not been declared a public road by the County Commissioner, but in which private rights or interests have been acquired by individuals, it is unlawful as to them, unless their consent is first obtained, and may be a nuisance. *Evans v. Savannah & W. R. Co.*, 90 Ala. 54.

Reservation in Plat of Part of Street for Railroad Purposes—Right and Title of Abutting Owner.—When the owner of a tract of land lays it off into lots or blocks, setting apart certain portions as streets, with a view of establishing a town, a subsequent sale and conveyance of lots abutting on the street, as shown by a map which is referred to, is a complete and irrevocable dedication of it to the use of the purchasers and the public, and the grantor cannot afterwards impose on the land an additional, inconsistent servitude; but, if lots are sold with reference to a map on which are marked lines showing a reservation of a part of the street for railroad purposes, the purchaser buys subject to this reservation, and his title as owner of the ultimate fee to the center of the street is subordinate to the reserved right. *Evans v. Savannah & W. R. Co.*, 90 Ala. 54.

Railroad on County Road—Authority of Municipal Officers of Town.—Where a county road has been included within the limits of an incorporated town, and the municipal authorities of said town have assumed control of such road, they may, under their general powers conferred by statute with reference to streets, alleys, etc., authorize a railroad company to use a portion of said road for the purpose of constructing its railway along the same, in accordance with the statute which provides for such construction. *Yates v. Town of West Grafton*, (W. Va., March 7, 1891), 12 S. E. Rep. 1075.

WICHITA & COLORADO R. Co.

v.

SMITH.

(*Kansas Supreme Court, Jan. 10, 1891.*)

Railroad in Street—Right of Abutting Owners to Compensation.—An abutting lot owner cannot recover damages by reason of the location of a railroad, duly authorized by the city council, along one of the regularly laid out streets of a city, unless there has been a practical obstruction of the street in front of his premises, and he is virtually deprived of access to his property.

Destruction of Ingress and Egress—Ballast of Roadbed.—The failure alone

of a railroad company to properly ballast its roadbed, where sufficient space is left in the street for ordinary vehicles and teams to pass in front of abutting property, will not authorize a recovery for damages alleged to have been sustained for the destruction of one's right of ingress and egress, where there is no evidence to show the terms and conditions upon which the privilege to build such railroad was conferred by the city authorizing the same.

COMMISSIONERS' decision. Error from District Court, Reno County.

J. H. Richards and *C. E. Benton*, for plaintiff in error.

F. L. Martin, for defendant in error.

GREEN, C.—This action was commenced by C. J. Smith, in the district court of Reno county, to recover damages for the alleged illegal, unlawful, and wrongful destruction of his right of ingress and egress to and from his premises, upon a legally laid out street in the city of Hutchinson. The plaintiff below alleged that he was owner of lots 55 and 57, avenue G east, in Handy's addition to said city; that prior to the 16th day of September, 1886, he had erected a house upon said lots, and was at said date using and had since used the same as a residence; that the only outlet and inlet he had to said property was from said avenue; that the railway company, on or about the 16th day of September, 1886, illegally, wrongfully, and improperly obstructed said avenue by erecting its track and switches much higher than the grade, and had kept its track and switches in such a condition as to obstruct the avenue and deprive the plaintiff of the use and benefit of the same as a means of ingress to and egress from his dwelling, and had further obstructed the avenue by improperly leaving large piles of ties and other building material in front of plaintiff's residence, and permitting large numbers of cars to stand upon the said track on said avenue. The railroad company answered that it was authorized to build its railroad along said avenue by an ordinance of the city of Hutchinson, and that its line of road was constructed in conformity with the terms and conditions of such authority; that the track of the railroad company was located 50 feet from the residence of the plaintiff.

The jury returned a verdict for the plaintiff, for \$225. With the verdict, the jury returned the following interrogatories and answers: "(2) When the defendant located its road and built its track on avenue G, was the grade of said avenue established adjacent to and abutting upon the plaintiff's property in question? *Answer.* No. * * * (4) State what is the approximate height of the embankment on said Avenue G in front of plaintiff's property. *A.* A cut of fifteen inches.

(5) Did the defendant make any ditches in said avenue G in front of plaintiff's property, or any part thereof? *A.* No. * * *

(7) What is the width of avenue G in front of plaintiff's property, or any part thereof? *A.* 120 feet. (8) Where on avenue G, in front of plaintiff's property, is the main line of the defendant's road located? *A.* 30 feet to center of track. (9) Where on avenue G, abutting upon plaintiff's property, is any side track or switch located, and how many side tracks and switches, if any, are located at that point? *A.* One switch north of main line. (10) What is the distance at the nearest point between plaintiff's property and any switch or side track of defendant? *A.* 44 feet to center of said track. (11) What is the nearest distance between plaintiff's property on said avenue G and the defendant's main line? *A.* About 27 feet. (12) Is there room for an ordinary vehicle and team to be driven on avenue G between the nearest track and plaintiff's property? *A.* Yes. * * *

(14) Is there room for ordinary vehicles to turn around in said space? *A.* No. (15) What is the average distance between the north line of plaintiff's property and the nearest track of the defendant? *A.* About 27 feet. * * *

(17) If, in estimating damages, you take into consideration the standing of cars or of coaches on avenue G, state whether the said standing of cars or coaches was in the said avenue G, adjacent to or abutting upon the property of the plaintiff in question. *A.* We do not. (18) Does the testimony introduced show that defendant's cars were permitted to stand upon said avenue G, adjacent to plaintiff's property, if at all, only for temporary time and temporary purposes? Yes. (19) If you answer the last question in the negative, state whether cars were permitted to stand at such place more than is usual, customary, or incidental to the necessities of railroad business. *A.* They were not. (20) Were the cars and coaches complained of at all times the same cars and coaches, or did they consist of different cars and coaches, which came and went in the regular course of traffic business? *A.* Different cars. (21) What was the market value of plaintiff's property immediately before defendant's road was located and its tracks constructed in said avenue G immediately abutting thereon? *A.* One thousand dollars. (22) What was a fair market value of plaintiff's property immediately after defendant's road was located and its tracks constructed in said avenue G abutting thereon? *A.* Seven hundred and seventy-five dollars. * *

(24) In estimating damage done to plaintiff's property, what do you take into consideration? *A.* By taking market value immediately before and after constructing said road. * *

(27) If the plaintiff has sustained damage, by reason of the

construction of defendant's tracks, did the damage occur by reason of the plaintiff not being able to use the said avenue G for the purpose it had been used prior to the construction of the said tracks? *A.* Yes. * * * (34) What, if any, obstruction to the passage of vehicles and teams is there in that part of the said avenue G between the plaintiff's property and the main line of defendant's road? *A.* None. (25) What, if any, obstruction to the passage of vehicles and teams is there in that part of the said avenue G south of the main line of the defendant's road, between Maple street, on the east, and Poplar street, on the west? *A.* None at present. (36) Is plaintiff prevented by any act proved to have been committed by the defendant from having access to his said property at any point on said avenue G abutting thereon? *A.* Yes. (37) If you answer the last interrogatory in the affirmative, state what it is. *A.* By not having the road properly ballasted. * * * (43) Can the plaintiff use the said avenue G adjacent to and abutting upon his said property in passing and repassing to and from the same, either to Poplar street, on the west, or Maple street, on the east? *A.* Yes. (44) Has the defendant, with its tracks and cars, permanently obstructed plaintiff's means of ingress to and egress from his said lots? *A.* Yes; to a certain extent. * * * (46) In estimating plaintiff's damage, do you take into consideration the general inconvenience and annoyance incident to the operation of defendant's railway so near plaintiff's said property? *A.* No. (47) Is plaintiff prevented from traveling upon said avenue G, and using the same as a public thoroughfare, by reason of the locating and constructing of defendant's tracks therein? *A.* Yes."

It is claimed by the plaintiff in error that, to justify a recovery in this case for damages by the abutting lot-owner, there must be such an obstruction of the street in front of the lots owned by the defendant in error that he is practically denied ingress to and egress from his premises; that the findings was not below quite conclusively that the plaintiff deprived of such right; that, notwithstanding the construction of the railroad track in the street, he still has 27 feet of such street in front of his place, free from obstruction; that there is room for ordinary vehicles and teams to pass between the railroad track and his property, and that he can still use avenue G, adjacent to and abutting upon his property, in passing to and from the same, either to Poplar street, on the west, or Maple street, on the east; and, hence, this case comes within the rule of non-liability of railroad companies, for constructing their lines along public streets, to abutting lot owners for damages.

**Plaintiff's
contention.**

On the other hand, the defendant in error contends that, if the railroad company had lawfully constructed its track, and legally operated its trains, it might be within the rule of non-liability heretofore adopted by this court, but that the defendant below constructed its line of road along the street in question in an illegal, improper, and wrongful manner, and because of the manner of the construction and operation of the road, he was entitled to recover; that, as an abutting lot owner, he has the right to every part of the street, and for the reason that the road was so constructed that he was deprived of the use of a portion of the avenue, he was thereby damaged.

Defendant's position.

The question of damages to abutting lot owners, by reason of the location of railway tracks in streets and avenues, has been settled by this court, and the rule is that, "to entitle a person owning lots abutting on a city street, along which a railroad company has constructed and is operating its line, by authority of the city council, to recover damages, there must be such a practical obstruction of the street in front of the lots that the owner is denied ingress to and egress from them." *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 234. In that case, the court said: "But where the location of the track is such that space enough is left in the street in front of the lots of the abutting owner, so that he can pass between the sidewalk and track, and the railroad is operated in a legal and proper manner, the lotowner cannot recover because the space within which he has heretofore passed from and to his lots is restricted." *Atchison & N. R. Co. v. Garside*, 10 Kan. 552; *Central Branch U. P. R. Co. v. Twine*, 23 Kan. 585; *Heller v. Atchison, T. & S. F. R. Co.*, 28 Kan. 625, 7 Am. & Eng. R. Cas. 636; *Kansas City & O. R. Co. v. Hicks*, 30 Kan. 288, 14 Am. & Eng. R. Cas. 100; *Central Branch U. P. R. Co. v. Andrews*, 30 Kan. 590, 14 Am. & Eng. R. Cas. 248; *Ottawa O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301. From the special findings, it appears that the plaintiff below had 27 feet of the street in front of his lots unobstructed, so that it cannot be said that he is deprived of the right of ingress and egress, but that the use of the full width of the street in front of his premises has been restricted, and for this alone, under the previous decisions of this court, there can be no recovery.

Abutter's right to compensation.

This brings us to the question of the right of the plaintiff to recover for the improper construction of the road. The special finding of the jury upon this branch of the case is to the effect that the plaintiff was deprived of free access to his premises, because the railroad track was not properly ballasted. The complaint

Improper construction of road.

is made that the ties were laid upon the street, and no provision made for vehicles to cross over the railroad track on that part of the street in front of plaintiff's lots. Did the failure of the railroad company to properly ballast its track deprive the plaintiff of his right of ingress and egress? The jury found that there was no obstruction to the passage of vehicles and teams in that portion of the avenue south of the main line of the defendant's railroad, between Maple street, on the east, and Poplar street, on the west, so the plaintiff had the unobstructed use of 27 feet of the street. There is no question but the city of Hutchinson authorized the construction of the railroad on this particular street, and, while the ordinance conferring this authority is not before us in the record, we must assume that the terms and conditions imposed by its provisions were complied with. There is no evidence to show that the railroad was not constructed in accordance with the ordinance. Now, can it be said that the plaintiff's property was damaged, or any right to its proper use affected by the failure of the railroad company to properly ballast its roadbed? That seems to be the only finding of the jury, with reference to the constructing of the railroad, of which plaintiff below can complain. Can it be said that the failure, upon the part of the railroad company, to properly ballast its roadbed, is such a wrongful and unlawful construction as would give the plaintiff below the right to recover damages for depriving him of his right of access to his property? Text writers and courts make a distinction between the right of the public to pass and repass along a highway, and the right of the owner of roadside or abutting property to have access to the same. If the claim of the plaintiff is to be sustained, it must be based upon the ground that a private right has been interfered with,—that is, the right to pass from his premises to the street, or from the street back again; and this is quite different from the public right of using the street. This court has said, in the case of *Railway Co. v. Cuykendall*, *supra*: "So that if the location and construction of a line of railroad are authorized by the city council, and its location in the street is such as to give the lotowner ingress to and egress from his lots, such use of the street by the railroad company does not interfere with the use of the lotowner, and consequently he cannot recover for those remote and indirect inconveniences arising from smoke, noise, offensive vapors, sparks, fires, shaking of the ground, and other annoyances." As stated, the ordinance authorizing the construction of the railroad is not before us, and we cannot say whether there was such a departure, by the railroad company, from the terms and conditions of the

ordinance authorizing the location, as would entitle the plaintiff to recover. It does not appear to us that the failure to ballast the roadbed in front of the plaintiff's lots interfered with his right of access to his property from and to the street; and a judgment based upon such a finding alone is erroneous. We recommend that the judgment of the district court be reversed, and judgment entered upon the special findings of fact for the railway company.

PER CURIAM.—It is so ordered; all the justices concurring.

Construction of Railroad in Street—Right of Abutting Owner to Compensation.—See *ante* Lamm v. Chicago, St. P., M. & O. R. Co., and note p. 42.

Negligent Construction of Railroad in Street, so as to block access to premises; action lies for, although road was constructed by due authority. *Quillinan v. Canada So. R. Co. (Ont.)*, 20 Am. & Eng. R. Cas. 31.

HOT SPRINGS R. CO.

v.

WILLIAMSON.

(136 United States 121.)

Railroad in Street—Right of Abutting Owners to Compensation.—A railroad company which constructed its road in a public street under a sufficient grant from the legislature or municipality, is nevertheless liable to abutting owners for consequential injuries to their property resulting from such construction, under a constitutional provision that "private property shall not be taken, appropriated, or damaged for public use without just compensation."

IN error to the Supreme Court of the State of Arkansas.

J. M. Moore, for plaintiff in error.

A. H. Garland, for defendant in error.

LAMAR, J.—This is an action at law, brought in the circuit court of Garland county, Ark., at its February term, 1883, by Curnel S. Williamson and Fannie G. Williamson, Case stated. his wife, against the Hot Springs Railroad Company, a corporation organized under the laws of that state, to recover damages for alleged injuries done to certain described real estate belonging to Mrs. Williamson, in the city of Hot Springs, by the defendant company. The declaration alleged that the plaintiff Fannie G. Williamson was the owner in fee of lots 1 and 2, in block No. 78, and lot 9, in block No. 69, in that city; that lots 1 and 2 are separated from lot 9 by Benton street, which is 140 feet wide, and was laid out by the general government and dedicated to the city, with the other streets in the city, before the damages for which suit was brought

were committed ; that lot 9 lies south of Benton street, lot 1 directly across the street on the north, and lot 2 lies immediately north of lot 1 ; that the defendant, a railroad company, organized as aforesaid, with its termini at Hot Springs and at Malvern, in Hot Springs county, in that state, by and through its agents and employes, on and prior to the 10th of December, 1881, constructed, threw up, and completed in and along the center of Benton street, between lots 1 and 9, and running the full length of those lots, a permanent embankment of earth and stone 50 feet wide and of great height, to serve as a roadbed for its railroad track, under a fraudulent and unauthorized contract secretly and clandestinely entered into between it and the city, for the purpose of defrauding and injuring plaintiffs; that the defendant also constructed a turning table at the southeast corner of that embankment and the northeast corner of lot 9, and immediately thereafter proceeded to lay and fix its railroad track permanently on the embankment, which thereby became and thereafter was a part or extension of its railroad ; that, by the embankment, extension, and turning table, plaintiffs and others were cut off from and deprived of the use of that street in connection with said lots, and their egress and ingress therefrom and therein impaired and destroyed; that said lots, which, by reason of their lateral frontage upon Benton street, were of great value, were thereby greatly damaged and decreased in value to the extent of \$5,000; and that, since the dedication of Benton street to the city, the defendant had wrongfully appropriated almost the whole of it for its roadbed and other purposes, thereby wantonly injuring plaintiffs, and all other owners of land adjoining that street. The prayer of the petition was for a judgment against the defendant for \$5,000, and for other relief.

The defendant answered, pleading ignorance as to whether the plaintiff Fannie G. Williamson was the owner of the lots described in the petition, and averring that those lots were located upon Malvern avenue, one of the original streets of the city of Hot Springs, which was laid off by the city, and opened and continuously used thereafter as a street, and was never vacated by the city. Further answering, it alleged that its railroad was constructed in and upon its right of way granted it by congress under the act of March 3, 1877, entitled "An act in relation to the Hot Springs reservation, in the state of Arkansas," and under the alleged ordinance of the city, which it denied had been passed clandestinely or through any fraud on its part; and also alleged that the turning table complained of was constructed on its right of way, and upon lots 10 and 11, in block 69, in the city, which were

defendants' own property. As a further answer, the defendant alleged that Curnel S. Williamson was improperly joined as a plaintiff in the action.

At the trial of the case before the court and a jury, the following agreed statement of facts, together with a map also agreed upon as correct, was filed: "(1) The accompanying map shows the location of Malvern avenue, Benton street, the plaintiffs' lots, and the right of way granted by congress to the defendant under the act referred to in defendant's answer, and approved by the Hot Springs commission and the secretary of the interior. (2) The extension claimed by the defendant under the ordinance of the city of Hot Springs consists of a strip fifty feet wide, the center thereof on a direct line with the center of the right of way granted by congress, and extending westward to Malvern avenue, a distance of 130 feet. (3) The turntable is fifty feet in diameter. It is located as marked on the map. Lots 10 and 11, in block 69, upon which a part of the turntable is located, belong to the defendant. (4) Gaines avenue was located as a street of said city of Hot Springs, and opened and accepted by the city, in 1876, October or September. It was 80 feet wide, and the northern boundary thereof was about coterminous with the northern boundary of defendant's right of way. The right of way is 100 feet wide, subject to explanation." The map referred to shows that Benton street and the right of way run almost east and west, the right of way extending south to the south line of Benton street. Immediately east of lot 9, and also adjacent to the right of way, is lot 10, and immediately beyond that is lot 11. The turntable is located partly on the right of way, and in part on the company's lots 10 and 11, and appears to be about 40 feet east of the east line of lot 9, and nearly the same distance east of the western extremity of the right of way granted by congress. Malvern avenue runs nearly from the southeast to the northwest, and is 130 feet west of the western terminus of the right of way. Considerable testimony was introduced on both sides on the question of damages as presented by the pleadings, and upon that question alone the evidence was conflicting. Evidence was also introduced on the part of the defendant to show that the alleged obstructions erected by it were such as are generally used at terminal stations, and were necessary for the operations of the road. One of its witnesses testified that "without the turntable the train could not be run on the right of way within the city of Hot Springs without great danger to life and property; for without [it] the engines could not be turned, and would have to be run in back motion, either in departing from

the depot or coming to it. This would be specially dangerous at night, as the headlight could not be seen while the engine was in back motion." The embankment was described by the witnesses as being 50 feet wide, and several feet higher than the grade of the street, and is inclosed by a granite wall. It is 25 feet from lot 9 on the south, and 65 feet from lot 1 on the north.

The ordinance of the city council granting a right of way 50 feet wide from the western terminus of the congressional right of way to Malvern avenue (130 feet) was also introduced, and it was admitted that the company had filed its written acceptance of the same within 10 days from its passage, as required by § 4 thereof. It also appeared in evidence that the city had, by an ordinance approved February 26, 1883, "authorized and empowered" the defendant "to erect all necessary and suitable depot buildings and other structures incident to the operation of its road within the limits of its 'right of way,' granted it by congress, * * * and to maintain and continue the same, or any depot buildings, or other erections or improvements heretofore constructed or made by it." That ordinance further provided that that part of Benton street, for two squares east of Malvern avenue, "within the limits of the 'right of way' granted by congress, * * * and the extension thereto heretofore granted by the city of Hot Springs, except so much thereof as shall be required to leave open the crossing of Cottage street, [first street east of Malvern avenue,] is hereby vacated and closed, and the extensive use and control thereof is granted to the Hot Springs Railroad Company for railroad and depot purposes."

After the testimony in the case had been closed, upon request of the plaintiff the name of C. S. Williamson was dropped from the complaint, and his evidence was also excluded from the jury.

At the request of the plaintiff the court charged the jury as follows: "(1) The court instructed the jury that the right

Instructions to Jury. to use streets in a city by the adjoining lotowners is property, and a right of way belonging to the owner of said lots, and that no such right can be taken or injured or appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money, or secured to him by a deposit of money, which compensation is irrespective of any benefit from any improvement made by said corporation. (2) The city of Hot Springs had no right to pass an ordinance granting the defendant a right of way along Benton street, and defendant could acquire no right to build any permanent structure or lay its track thereon by virtue of such ordinance. (3) The

court instructs the jury that the measure of damages to adjacent property caused by the use of a street as a site for a railroad is the diminution of the value of the property ; and the recovery may include prospective as well as past damages, when the obstructions to the use of the street are of a permanent nature." The court, upon its own motion, instructed the jury "that if they believe, from the evidence, that the defendant, by its agents or employes, constructed in Benton street, between lot 9, in block 69, and lots 1 and 2, in block 78, in the city of Hot Springs, a permanent embankment, as a roadbed on which to lay and extend its railroad track, and then, or before the commencement of this suit, placed and fixed its track permanently upon said embankment, as charged in the complaint ; that said lots, or any of them, were or are permanently injured or damaged thereby ; and that said lots were then, and still are, the property of the plaintiff, Fannie G. Williamson,—they must find in her favor ; and in such case the difference between the present value of the lot or lots so damaged with the embankment, and the said track thereon existing, and what such value would be if the embankment and said track were removed or had never existed, is the measure of damages." To all of which instructions the defendant at the time excepted. The defendant requested the court to give several instructions to the jury, which the court declined to do, except in one instance, in a modified form ; to which refusals the defendant at the time excepted, but, as none of them are relied upon in the argument in this court except the second one, it is only necessary to set that one out in full. It is as follows: "The right of way was granted by congress to the defendant from a point on the eastern boundary of the Hot Springs reservation to the old Malvern stage road within said reservation. The grant carried with it the right to erect and maintain all suitable structures usual and necessary to the operation of a railroad, including a depot, station house, and such tracks and other improvements of that nature as are necessary to the proper and convenient dispatch of its business, and if you find that the turntable and other improvements complained of, or any part of them, are within the right of way granted by congress to the defendant as aforesaid, and are necessary to the operation of its road, and such as are usual at terminal stations, you cannot find for the plaintiffs by reason of any damage caused to their lots by such improvements."

The jury returned a verdict in favor of the plaintiff for the sum of \$2,275, upon which judgment was rendered ; and after a motion for a new trial, and also a motion in arrest of judgment, had both been overruled, an appeal was taken to the

supreme court of the state, which affirmed the judgment of the trial court. 45 Ark, 429. This writ of error was then sued out. The following is the only assignment of error: "The court erred in ruling that the plaintiff in error did not have the lawful right to construct its works, including the turntable, on the right of way granted it by the act of congress of March 3, 1877, and in holding that it was liable to the defendant in error by reason of the alleged obstruction caused by said works."

From the foregoing statement it is observed that the claim for damages in the trial court was based upon two propositions: *First*, that the plaintiff's property was injured by reason of the embankment in Benton street alongside it, west of the terminus of the congressional right of way; and, *second*, that it was also injured by reason of the construction and existence of the turntable partly upon the congressional right of way,—no claim for damages ever having been made by reason of the construction of a roadbed and track upon the congressional grant. It is also observed that while the defendant saved exceptions to the various rulings of the court on the question of damages arising from the construction of the embankment on that part of Benton street separating the plaintiff's lots, and also as to the rule for the computation of such damages, none of those exceptions are embodied in the assignment of error, nor is any point made in relation to them in the brief of counsel for the company. In his own language, "the only question before this court is that which arises under the act of congress, * * * and relates alone to the turntable and works constructed on that part of the right of way embraced in the grant by congress. This excludes from consideration the embankment built upon the western extension of the track, under the city ordinance, and involves the proper construction of the act of congress." The question before us is therefore narrowed down to the ruling of the trial court upon the only issue which the assignment of error presents. Upon an examination of the record, it will be found that no evidence was introduced by the plaintiff as to whether the turntable and other works constructed on the right of way injured and damaged her property at all; and the only evidence on that subject was introduced by the defendant, which evidence tended to show that, by the erection of a depot and other works on the right of way, property in that vicinity had not only not been depreciated, but had, in reality, risen in value. It is further observed that in its charge to the jury the court made no reference whatever to the question of damages arising out of the construction and operation of

Question presented.

the turntable and other works on the congressional right of way, except that it refused to charge that the defendant had the right to construct and maintain whatever structures thereon it might deem essential to its business, as above set forth in detail; or that, having that right, it was not liable to the owners of abutting real estate for damages caused by the exercise of that right in a proper and skillful manner. Inasmuch, therefore, as the plaintiff introduced no evidence to sustain that branch of her claim for damages, the court was constrained to conclude that it was eliminated from the case. She certainly could not obtain a verdict for any damages arising out of that branch of the claim without introducing any evidence to support it. The evidence which the defendant introduced bearing on that question, if taken into consideration by the jury at all, could not have had any but a favorable effect as to the defendant; but, as already remarked, it was rendered unnecessary by the plaintiff's virtual abandonment of that part of her claim for damages. There is nothing in the record to show that that evidence was considered by the jury in arriving at their verdict, because no charge relative thereto was given by the court, or could legally have been given by it, on that question. The refusal of the court to charge upon an abstract question, in relation to which the plaintiff had introduced no evidence, and which was not, therefore, before it, was not error.

While we hold this view upon the sole question involved in the assignment of error, it is proper to add that we concur in the view taken of this case by the supreme court of Arkansas. That court held that the act of congress granting the right of way to the defendant company over the strip of land upon which its road was to be operated (which in this case was along the line of Benton street, an original street in the town of Hot Springs, and used as such at the time of the passage of the act) carried with it the right to construct, maintain, and operate its line of railroad therein, and to appropriate such right as a location for its turntable and depots, and for any other purpose necessary to the operation of its road; but that it was equally clear, under the provisions of the present constitution of the state of Arkansas, that if, in the exercise of that right, the property of an adjoining owner was damaged in the use and enjoyment of the street upon which the road was located, such owner would be entitled to recover such damages from the company. It further held that the contention of the plaintiff in error that the act of congress invested it with an absolute title to the street along which its road was located, and exempted it from any liability

Right of property owner to compensation.

for consequential damages resulting to an abutting owner from the laying of its track in a proper and skillful manner, was founded upon cases arising under the familiar constitutional restriction that private property shall not be taken for public use without compensation, which decisions generally turned upon the question, what is a taking, within the meaning of such provision? that the constitution of that state of 1878, which provides that "private property shall not be taken, appropriated, or damaged for public use without just compensation," has changed that rule; that all the decisions rendered under similar constitutional provisions concur in holding that the use of a street by a railroad company as a site for its track, under legislative or municipal authority, when it interferes with the rights of adjoining lot owners to the use of the street, as a means of ingress and egress, subjects the railroad company to an action for damages on account of the diminution of the value of the property caused by such use; and lastly, that, even conceding the authority of the town of Hot Springs to pass the ordinance authorizing the company to construct and maintain the railroad embankment, track, and turntable complained of, it cannot impair the constitutional right of the defendant in error to compensation. We think those views are sound, and in accordance with the decisions of this court in *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, and *New York El. R. Co. v. Fifth Nat. Bank*, 135 U. S. 432, 43 Am. & Eng. R. Cas. 403. The judgment of the court below is affirmed.

Railroad in Street—Right of Abutting Owner to Compensation.—*Lamm v. Chicago, St. P., M. & O. R. Co.*, and note, p. 42.

BERONIO

v.

SOUTHERN PACIFIC R. CO.

(86 *California*, 415.)

Railroad in Street—Injury to Two Parcels of Land—Single Cause of Action.—Where the owner of a lot abutting upon a street along which a railway has been constructed, recovers a judgment for damages to such lot, such judgment is a bar to an action for damages to another abutting lot owned by the same party a few hundred feet distant, arising from the same cause and accruing at the same time. Nor is such owner entitled to recover for the continued operation of the railroad after the judgment in the former action, where the evidence shows no damage accruing after that date.

Same—Subsequent Construction of Side Track.—Where the owner of such abutting lots claimed that he was entitled to recover for damages to the lot involved in the first suit, by reason of the construction and operation

of a side track since the judgment in the first action, and the court ruled in his favor in that regard, but he failed to prove any damages accruing specially by reason of such construction, a verdict in favor of the railroad company will not be disturbed.

APPEAL from Superior Court, Ventura County.

H. L. Poplin and *Barnes & Selby*, for appellant.

R. B. Canfield and *Blackstock & Shepherd*, for respondent.

Fox, J.—The town of San Buenaventura is a municipal corporation. The legal title to the lands comprising Front street in said town was granted to the then town authorities, October 13, 1869, "as a public street, ^{Case stated.} to be forever kept open and maintained as such, and not to be used for any other purpose, nor be diminished in width." On the 4th of October, 1886, the president and board of trustees of the town, by ordinance, granted to the defendant a right to lay, maintain, and operate a single or double track railroad along and upon said Front street for the whole length thereof, from a point near Kalorama street, etc. The plaintiff owned two lots fronting on the north side of said street, one situate in block 19, and one in block 20, the two being separated by a distance of 260 feet. The railroad was constructed along said Front street prior to September 13, 1888, and on that day plaintiff commenced an action against defendant for damages to his lot situate in block 19 by reason of a cut and fill made in the construction thereof, and on the 26th day of January, 1889, the amount of plaintiff's damages were agreed upon and settled between the parties, and paid by defendant to plaintiff, and thereafter, in pursuance of the agreement between the parties, judgment was entered in the cause in favor of defendant. Afterwards the defendant put in a switch on the south side of the street, opposite said block 19, and thereupon the plaintiff brought this action, alleging, in the first count of his complaint, damages by reason of the construction and maintenance of said railroad in front of his lot in block 20, and, in the second count, damages to his said lot in block 19, accrued since the former settlement and judgment, by reason of the continuance of said railroad, and the operation thereof, and of the construction of said switch, in front of his said lot in block 19. The defendant denied all the allegations of the complaint other than those of incorporation, pleaded its license from the municipal authorities, and, as a separate defense to the second cause of action, pleaded the former settlement, payment, and judgment in bar. At the trial, after the jury was impaneled, but before the introduction of any evidence, defendant moved the court for leave to amend its answer by pleading the former settlement and judgment as a bar to all the causes of action set out in the complaint. To

this the plaintiff objected, on the ground that the amendment did not constitute a defense. After argument, the court overruled the objection, and the amendment was made, the court not imposing terms, to which plaintiff excepted, but plaintiff asked no continuance on account of such amendment. Plaintiff then introduced some evidence tending to show damage to his lot in block 20 by reason of the construction of said railroad, a cut of 18 inches in depth having been made in the street by reason thereof. Defendant then introduced the judgment roll in the former case, which was admitted without objection, and it was admitted by the parties that the parties to that action were the same as to this; that the railroad mentioned in the former complaint was one and the same railroad as that mentioned in this case; that plaintiff at the time owned the same lots as now, and was then the owner of the same cause of action upon which he now claimed under his first count of the present complaint; and that the said two lots were separated by a distance of 260 feet. Plaintiff then proposed to introduce further evidence as to his damage to the lot situate in block 20,—the cause of action mentioned in the first count of his complaint,—but the court ruled the same out, on the ground that his claim for such damage was barred by the said former judgment. Plaintiff admitted that he had no claim for damage to his lot in block 19 caused by the construction of the railroad's main track. The record fails to show the introduction or offer of any evidence of damage by reason of the construction and maintenance of the switch. The plaintiff asked the court to instruct the jury that the former settlement and judgment were not a bar to any claim for damages done to the lot in block 20; that such damages, if any, constituted a separate cause of action from that sued for in the former case, and, if any such were found, the same should be included in a verdict for plaintiff. The court refused to so instruct the jury, and, on the contrary, instructed the jury that, as the case was presented, the only question for their consideration was the damages, if any, done to the lot in block 19 by reason of the construction and operation of the switch and side track in front of his premises in that block. To all these rulings the plaintiff excepted.

We think there was no error in the rulings or instructions of the court in this behalf so far as relates to any damage accruing to either of plaintiff's lots prior to and up to the time of filing his complaint, or making his settlement in the former action. The elements of his damage up to that time may have been multifarious, but the cause of it was a unit,—the construction and operation of a single railroad, which was com-

Damages to
lots—Single
cause of
action.

plete at the time. The fact that it damaged two lots belonging to the same man at the same time, and by the same means, no more created two causes of action than if two horses be longed to the same man had been killed by a single collision with a locomotive; and this has been held to constitute but a single cause of action. *Brannenburg v. Indiana, P. & C. R. Co.*, 13 Ind. 103. In cases of tort, the question as to the number of causes of action which the same person may have, turns upon the number of the torts, not upon the number of different pieces of property which may have been injured. Each separate tort gives a separate cause of action, and but a single one. 1 Suth. Dam. 183, and cases cited. Whenever by one act a permanent injury is done, the damages are assessed once for all. 3 Suth. Dam. 372. This principle is established in *Marble v. Keyes*, 9 Gray (Mass.), 221, and in very many other cases. There is nothing in the authorities cited by appellant in conflict with this view.

Appellant claims that he was entitled to recover for the damages sustained by the continued operation of the railroad after the settlement and judgment in the former case. This claim conflicts with the authorities already cited, but under *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190, and *Ford v. Santa Cruz R. Co.*, 59 Cal. 290, there might be some force in the argument, if there was anything in the case upon which to base it. But the record shows that plaintiff admitted that he had no claim for damages to the lot in block 19 accruing after the date of the former complaint, and it fails to show any proof of damages to either lot after that date.

Appellant also claims that he was entitled to recover for the damages to his lot in block 19 by reason of the construction and operation of the switch and side track. The court ruled in his favor in that regard, and he proved the fact of the construction and operation of the switch and side track, but his record fails to show that he offered to prove any damages by reason thereof. We cannot therefore disturb the verdict of the jury in that regard.

Appellant also complains of the action of the court in permitting the answer to be amended, after the jury was impaneled, and in denying his subsequent motion to strike out the amendment. This was a matter entirely in the discretion of the court. The plaintiff does not seem to have been taken by surprise, or to have suffered any injury therefrom, and we do not perceive that there was any abuse of discretion. Judgment and order affirmed.

I concur:—PATERSON, J.

WORKS, J.—I concur in the judgment. Under the circum-

stances of this case, the lots claimed to have been affected lying near to, if not adjoining, each other, and the road being completed at the time the first action was brought, the settlement of that case was rightly held to be a bar to the second action. But a case might arise where a road being constructed would pass over and affect two tracts of land owned by the same person, the tracts being a long distance apart, and that part of the road affecting one piece of land be constructed long before the part affecting the other piece. In such a case the construction of the whole road could not, with any propriety, be treated as but one act, and the landowner be compelled to delay his action until the whole road is completed, and join his action for damages to both pieces of land, or bring his action for both, when it may be uncertain whether the last part of the road will ever be completed or not. Under such circumstances, separate actions should be allowed, and, in my judgment, the opinion of Mr. Justice Fox is too broad in its language in this respect.

PORTER

v.

MIDLAND R. CO.

(125 Indiana, 476.)

Railroad in Street—Action by Abutting Owner—Ejectment or Injunction—Estoppel.—An abutting owner may maintain an action for damages against a railroad company which wrongfully builds its track upon a street. But where he stands by without objecting, until the rights of the public and third parties have intervened, he cannot maintain either ejectment or injunction.

Same—Limitation of Action.—An action for damages for injury to property by the wrongful construction of a railroad in a street, must be brought within six years from the completion of the grade, or it will be barred by the statute of limitations which limits to six years, actions for injuries to real property.

APPEAL from Montgomery County Circuit Court.

L. F. Copping, for appellants.

Henry Crawford and *Thos. F. Davidson*, for appellee.

ELLIOTT, J.—The material questions in this case arise upon the ruling of the trial court awarding the appellee judgment upon the special verdict. The facts contained in the Case stated. verdict are these: On the 2d of April, 1872, the board of trustees of the town of Ladoga adopted a resolution licensing the Anderson, Lebanon & St. Louis Railroad Company to construct a railroad track along a street in the town, upon which

street the appellant was an abutting owner. In the year 1873, the company named "constructed a grade" along the street, and for that purpose dug excavations and built embankments. The grade was visible, and was part of a continuous line. In November, 1875, the company named conveyed all its property and franchises by mortgage, and this mortgage was duly foreclosed by a decree of the circuit court of the United States for the district of Indiana. On this decree, a sale was made to the appellee, and a deed duly executed to it in July, 1885. The grade remained without substantial change until September, 1887, and the appellee constructed its track upon the grade during that month.

The appellant, as the owner of the fee, had a right of action against the appellee. It is now well settled by our own decisions that the owner of the fee of a street may maintain an action against a railroad company which wrongfully builds its track upon the street; and the great weight of modern authority sustains this doctrine. *Cox v. Louisville, N. A. & C. R. Co.*, 48

Abutters' right of action
—Ejectment or injunction.

Ind. 178; *Terre Haute & I. R. Co. v. Scott*, 74 *Ind.* 29, 3 *Am. & Eng. R. Cas.* 208; *Burkham v. Ohio & M. R. Co.*, 122 *Ind.* 344, 43 *Am. & Eng. R. Cas.* 153. *Vide* authorities cited note 1, p. 528, *Elliott, Roads & S.* Where there is no element of waiver or estoppel the owner of the fee may maintain ejectment, or he may have equitable relief by injunction in the proper case. *Terre Haute & S. E. R. Co. v. Rodel*, 89 *Ind.* 128, 10 *Am. & Eng. R. Cas.* 284; *Indiana, B. & W. R. Co. v. Allen*, 113 *Ind.* 581, (*vide* authorities cited p. 582;) *et seq.*; *Midland R. Co. v. Smith*, 113 *Ind.* 233. But where he stands by, without objecting, until the rights of the public and of third parties have intervened, it is held, upon the ground of public policy, that he cannot recover the possession of the land, nor maintain injunction. *Midland R. Co. v. Smith*, *supra*; *Terre Haute & S. E. R. Co. v. Allen*, *supra*; *Louisville, N. A. & C. R. Co. v. Beck*, 119 *Ind.* 124; *Midland R. Co. v. Smith*, 125 *Ind.* 509, 44 *Am. & Eng. R. Cas.* 222; *Strickler v. Midland R. Co.*, 125 *Ind.* 412, (October 15, 1890.) In this case, the grade constructed in 1873 was notice to the appellant that the appellee's predecessor claimed the right to construct a railroad track upon the street, as the licensee of the municipal corporation, for the character of the work was such as to impart notice. *Paul v. Connersville & N. J. R. Co.*, 51 *Ind.* 527; *Jeffersonville, M. & I. R. Co. v. Oyler*, 60 *Ind.* 383; *Indiana, B. & W. R. Co. v. McBroom*, 114 *Ind.* 198, 33 *Am. & Eng. R. Cas.* 90. The appellant therefore had notice as early as 1873 that a railroad company intended to construct a track upon the street, and knew that it had prepared the grade for that

purpose, and it is too late for him to maintain ejectment, or secure an injunction. His silence and inactivity did more than impair his remedy. It destroyed his right of action for possession as well as for an injunction. It does not follow that, because the appellant cannot sue for an injunction or maintain an action of ejectment, he is remediless; on the contrary, as is clearly indicated in several cases, and directly decided in one case at least, he may maintain an action for damages. *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581; *Strickler v. Midland R. Co.*, *supra*.

In *Indiana, B. & W. R. Co. v. Allen*, *supra*, it was said: "We do not controvert the doctrine that acquiescence will not preclude a recovery of damages. That we affirm to be the true doctrine. Unless prolonged until the statute of limitations has run, an action for damages will lie; after that period, however, it is conclusively presumed that the damages have been paid." *Vide* opinion p. 584. This doctrine is sustained by the cases of *Rusch v. Milwaukee, L. S. & W. R. Co.*, 11, 54 Wis. 136, 6 Am. & Eng. R. Cas. 609; *Evans v. Missouri, I. & N. R. Co.*, 64 Mo. 453.

If the appellant had brought this action before the statute of limitations had run, we have no doubt that he would be entitled to recover damages for the injury to his property. It is evident from what has been said that the only right of action which the appellant is in a situation to assert is one for injury to property. He cannot recover the property itself, nor can he have an action on a contract, for there is no contract; so that if he had any right of action at all, it must be for the injury to him as the owner of the fee. This injury consists in making a wrongful use of his land, and his right of action is for the damages resulting from that wrong. It was, therefore, correctly held in *Strickler v. Midland R. Co.*, *supra*, that the six years statute is the one which rules the case. It cannot be successfully contended that each day's continuance of the wrong gave a fresh cause of action, for the occupancy of the street was for a permanent purpose, and of this purpose the acts done under the license from the town gave full notice. Where there is an occupancy of a street for a permanent purpose, as for the purpose of building and operating a railroad, the abutting owner cannot maintain an action for each day's occupancy. The case is entirely different from one wherein the wrong is a mere fugitive or temporary trespass, or a mere entry without color of right, for the work undertaken was in its nature permanent, and there was color of right under the license granted by the municipality. If a railroad company could be sued

Limitation of
action.

for each day's occupancy, the burden imposed upon it would be a grievous one, which no principle of justice would justify. If the property owner, by one action, can recover all the damages he suffers, he secures all that justice can award, and the railroad company is compelled to pay all that equity demands. The doctrine that successive actions cannot be maintained in such cases as this, and that the property owner must recover once for all, has been again and again asserted by this court. *White v. Chicago, St. L. & P. R. Co.*, 122 Ind. 317, 43 Am. & Eng. R. Cas. 156; *City of Lafayette v. Nagle*, 113 Ind. 425, 22 Am. & Eng. Corp. Cas. 411; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308; *City of Terre Haute v. Hudnut*, 112 Ind. 542, 18 Am. & Eng. Corp. Cas. 302; *City of North Vernon v. Voegler* 103 Ind. 314, 13 Am. & Eng. Corp. Cas. 434; *Burrow v. Terre Haute & L. R. Co.*, 107 Ind. 432, 29 Am. & Eng. R. Cas. 574; *Lafayette Gravel-Road Co. v. Stockton*, 43 Ind. 328; *Lafayette, etc., Co. v. New Albany & S. R. Co.*, 13 Ind. 90. The decisions of other courts assert the same doctrine. *Vide* authorities cited in note, p. 199, Elliott, Roads & S. The rule that a property owner must recover once for all does not preclude him from recovering damages for injuries resulting to his property from negligence in operating the railroad, for the abutter's right of action for damages caused by culpable negligence in operating a railroad rests upon an entirely different ground from that upon which rests the right of action for injury to his property by the wrongful entry. *White v. Chicago, St. L. & P. R. Co.*, *supra*. A railroad company which obtains the privilege of using a street, and pays damages to the abutting owner, secures a right to use the street in a reasonable and necessary manner, but it does not secure a right to use it in a culpably negligent manner, to the injury of abutting property. But there is here no question as to the mode in which the appellee operated its railroad, for the single question is as to the right of the appellant to recover for the injury done to his property by the wrongful occupancy of the street upon which it abuts, so that the case comes within the rule that the abutting owner must recover once for all, and falls within the statute limiting the time within which actions for injuries to property shall be brought. In holding, as we did in *Strickler v. Midland R. Co.*, *supra*, and as we do here, that the appellant's right of action is barred by the six-years statute, we are supported by adjudged cases which assert that, where no claim is made within the period of limitation, it is conclusively presumed to have been paid. *Midland R. Co. v. Smith*, 125 Ind. 509, (September 18, 1890;) *Blair v. Kiger*, 111 Ind. 193; *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134. *Vide* authorities cited note 4, p. 206, Elliott, Roads & S. If

it be just to presume payment of compensation in one case, so it must be in all cases of like character. The presumption must be made, or else the long settled rule that statutes of limitations are statutes of repose must be disregarded. The decision of the trial court must be sustained, upon the ground that the facts stated in the special verdict show that the appellant's right of action is barred by the statute of limitations. Judgment affirmed.

Construction of Railroad in Street—Right of Abutting Owner to Maintain Ejectment or Injunction.—See *Tomkins v. Augusta & K. R. Co.*, 43 Am. & Eng. R. Cas. 127, note 129; *Taylor v. Bay City St. R. Co.* (Mich.), 43 *Id.* 335; *Georgia S. & F. R. Co. v. Ray*, (Ga.), 43 *Id.* 95; *Fogg v. Nevada, California & Oregon R. Co.*, (Nev.), 43 *Id.* 105; *Harbach v. Des Moines & K. C. R. Co.* (Iowa), 43 *Id.* 115.

Right of Abutting Owner to Enjoin Construction of Railroad Along Highway.—In *Yates v. Town of West Grafton*, (W. Va., March 7, 1891), 12 S. E. Rep. 1075, it was held that the owner of lots and lands adjoining a county road which has been included within the limits of an incorporated town, along which such railroad is constructed, whether they own the fee in the ground occupied by the road or not, cannot enjoin the railroad company from constructing its railroad along the road in the manner required by the statute, unless the injury therefrom will entirely destroy the value of his property, and thereby be equivalent to a taking of it by said railroad company. The court said: "Our Code, (chapter 54, § 50,) among other things, expressly confers upon railroads the power to construct such railways 'across, along, or upon any stream of water, watercourse, street, highway, road, turnpike, or canal which the route of such railroad shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, road, turnpike, or canal thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness, and to keep such crossing in repair: * * * provided, that, in case of the construction of said railroad along highways, roads, turnpikes, or canals, such railroads shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same, or condemn the same, under the provisions of section 48 of this chapter;' and Dillon's Municipal Corporations (volume 2, § 666) asserts the law upon this subject as follows: 'The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority. Without a judicial determination, a municipal corporation, under the authority conferred in its charter 'to locate and establish streets and alleys, and vacate the same,' may constitutionally order the vacation of a street; and this power, when exercised with due regard to individual rights, will not be restrained at the instance of a property owner claiming that he is interested in keeping open the streets dedicated to the public.' Under the law, then, as it exists, the municipal authorities of said town having the right to authorize said railroad company to construct and operate its railroad along a portion of said road lying within the limits of said town; and said railroad, under the statute, having the power to accept said use and privilege, and to construct its railroad along said road, it being expressly provided in the statute that, in so doing 'such railroad shall restore the road so intersected or touched to its former state, or to such a state as not unnecessarily to impair its usefulness;' and it having been held, as we have seen, in *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352, that 'the authority to use a public highway for the pur-

pose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such taking of private property from the owner of the fee of the adjacent lands as is contemplated by the provision of the constitution in reference thereto—"my conclusion is that the plaintiff by his bill and exhibits has not presented such a case as would entitle him to the relief prayed for."

Same—Special Damage not Suffered by the Public in General.—In *Chicago St. L. & P. R. Co. v. Eisert*, (Ind., Feb. 4, 1891), 26 N. E. Rep. 759, the owner of property abutting upon a highway applied for a restraining order prohibiting the defendant railroad company from constructing an additional track on the street in front of her property. The complaint alleged that defendant railroad company was proceeding to lay a track within eight feet of the curb stone in the street in front of plaintiff's premises, while the ordinance authorizing the use of the street directed the road to be located 15 feet from the curb stone, and to raise the grade of the street above the established grade, which it had no right to do, obstructing the street, and entirely cutting off plaintiff's only means of ingress and egress by wheeled vehicles, endangering her property by fire, and the lives of her family, obstructing the natural flow of the water, and turning it upon her premises. *Held*, that it stated a case of special damage not suffered by the public in general, and showed the right to an injunction.

Action to Enjoin Maintenance of Railroad in Street and for Damages—Single Cause of Action.—In *Shepard v. Manhattan R. Co.*, 117 N. Y. 442, it was held that a complaint seeking to enjoin the maintenance of an elevated railroad upon a street in front of plaintiff's property, and for damages caused by its maintenance, contains but a single cause of action.

Acquiescence of Landowner in Construction of Road—Injunction or Ejectment—Waiver of Landowner's Right.—A landowner who stands by and permits a railroad company to enter and construct its road upon a street or complete its grade, or expend a considerable amount of money in the construction of its roadbed, thereby waives his right to maintain either an action of ejectment or for an injunction to prevent further prosecution of the work. But if the company has unlawfully entered upon the land, the owner may maintain an action for damages, or institute proceedings under the statute for the assessment of his damages. *Strickler v. Midland R. Co.*, 125 Ind. 412.

Dissolution of Injunction on Bond.—An injunction to prohibit the construction of a public work, the building of which involves no taking or invasion of plaintiff's property, but only an alleged consequential damage to its value, which is conjectural and incapable of ascertainment until after the construction, may be properly bonded, notwithstanding the provision of article 156 of the constitution. *McMahon v. St. Louis, A. & T. R. Co.*, 41 La. Ann. 827.

An injunction to prevent a street railroad company from building its track will be dissolved where the company gives a sufficient bond conditioned to pay the plaintiff all damages done his property, where the evidence as to damage is conflicting and it is doubtful whether any damage will be sustained by plaintiff. *Fouche v. Rome St. R. Co.*, 84 Ga. 233.

Limitation of Action to Recover Damages for Construction of Railroad in Street.—Where a railroad company unlawfully entered and took possession of a street, and constructed and completed its grade, the cause of action of the abutting landowner thereupon accrued, and under section 292, Ind. R. S. 1881, which limits actions for injuries to real property to six years, the action must be brought within six years from the completion of the grade, or it is barred. *Strickler v. Midland R. Co.* 125 Ind. 412.

Injury Caused by Laying Additional Tracks in Street—Limitation of Action.—The owner of property abutting upon a street in which a railroad

company has wrongfully constructed a number of tracks, and which it uses for a switch yard, can recover damages for injuries to his property occasioned by the company's laying and using a number of additional tracks, although the original tracks which did not damage his property were laid more than two years—the period of limitation—before suit was brought for the damage caused by the additional tracks. *Gulf, C. & S. F. R. Co. v. Necco*, (Texas Sup. Ct., March 21, 1891), 15 S. W. Rep. 1102.

HALSEY

v.

RAPID TRANSIT STREET RAILWAY CO.

(*New Jersey Court of Chancery, December 6, 1890.*)

Ownership of Land in Street.—The ownership in land over which a street has been laid is, for all substantial purposes, in the public, although the owner retains the naked fee, and the right of the public to use it for public travel is the primary and superior right.

Right of Public to Use Street.—Land taken for a street is taken for all time, and compensation is made once for all, and, by the taking, the public acquire the right to use it for travel, not only by such means as were in use when the land was acquired, but by such other means as new wants and the improvements of the age may render necessary.

What Constitutes Legitimate Use of Street.—Any use of a street which is limited to an exercise of the right of passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not, in any substantial degree, destroy the street as a means of free passage, common to all the people, is a legitimate use, and within the purposes for which the public acquired the land.

Obstruction of Highway—Right of Action by Individual.—An individual cannot maintain an action for injury caused by obstructing a highway unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of his property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.

Same—A Preliminary Injunction will not be granted where either the complainant's right is in doubt or where the damage which will result from an invasion of his right is not irreparable.

An Abutting Owner is Allowed to Exercise Privileges on the Sidewalk, in front of his premises, which he may not exercise elsewhere in the street, because he is chargeable with the whole expense of maintaining the sidewalk.

Use of Highway by Abutter.—When not restrained by ordinance or otherwise, an abutter may use the highway in front of his premises for loading and unloading goods, for vaults and chutes, for awnings and shade trees, but only on condition that he does not interfere with the safety of public travel. The public right is paramount, and that of the abutter subordinate.

Exercise of Corporate Franchise—Implied Powers.—Where a corporation is authorized by a general grant to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its erection.

Exercise of Power by Municipal Corporation—Method.—Where no method is prescribed by law in which a municipality shall exercise its powers, but it is left free to determine the method for itself, it may act either by resolution or ordinance.

Electric Railway—Poles in Street—New Servitude.—Placing poles in the middle of the street, for the purpose of using electricity for street car propulsion, does not impose a new servitude on the land in the street,—the poles facilitate the use of the street as a public way.

New Method of Using Street—Additional Servitude.—The question whether a new method of using a street for public travel results in the imposition of an additional burden on the land or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use.

Lamp-posts and Other Appropriate Instruments may be lawfully erected in the streets of a city for the purpose of lighting them at night.

ON application for an injunction, heard on bill and affidavits and answer and affidavits.

John R. Emery and Frederick W. Stevens, for complainant.

Chandler W. Riker and Theodore Runyon, for defendant.

VAN FLEET V. C.—The complainant owns lands abutting on Kinney street and Belmont avenue in the city of Newark. His lands have a frontage on Kinney street of 236 feet, and on Belmont avenue of about 133 feet. Case stated.

His title extends to the middle of the street. The defendant is a street railway corporation. It was organized under a general statute approved April 6, 1886, entitled "An act to provide for the incorporation of street railway companies, and to regulate the same," (Supp. Revision, 363.) The defendant has laid two railroad tracks in Kinney street, and intends to lay two others in Belmont avenue. One of those laid in Kinney street is on that part of the street in which the complainant owns the fee of the land. No claim is made that these tracks were put down without authority of law, or in violation of the complainant's rights. They are unquestionably lawful structures. They were put down by permission of the city authorities, and under their supervision. The defendant intends to use electricity as the propelling power of its cars, and, for the purpose of applying this force to the motors on its cars, it has, with the permission of the city authorities, erected three iron poles in the center of Kinney street, and strung wires thereon. The poles stand partly on the complainant's land. The erection of these poles, and the use to which the defendant intends to apply them, constitute the only grounds on which the complainant rests his right to the relief he asks. The bill describes these three poles as standing 111 feet distant from each other, about 20 feet in height, 10 inches by 6 in diameter at the base, set in a guard, or frame in the form of an inverted cup, which at its base is

22 inches by 18 in diameter. To what depth below the surface the poles have been sunk, or what are the dimensions of the part extending below the surface, or whether they have been put in the earth at all, or simply set up on the surface, are matters in respect to which neither the bill nor the answer gives any information whatever. Both pleadings, however, agree that the poles stand in the center of the street, so that it is an undisputed fact in the case that the whole extent of the land of the complainant occupied by either the poles or the guards are 3 spaces of 9 inches by 11, and that the spaces so occupied are in that part of the street where the right of the public is, for purposes of travel, paramount as against the complainant. The poles were erected without the consent of the complainant and without compensation to him. No compensation is intended to be made. The complainant insists that the erection of the poles imposed a new and additional servitude on his land in the street,—in other words, that his land, by the erection of the poles, has been appropriated to a purpose for which the public have no right to use it. If his insistent is true, it is obvious that his constitutional rights have been violated, for one of the most important guaranties of the constitution is that private property shall not be taken for public use without just compensation. It is likewise obvious that, if the complainant's constitutional rights have been invaded by the erection of the poles, he is entitled to protection by injunction, for that is the only remedy which will adequately redress his wrong. It is the only judicial means by which that which has been taken from a citizen in violation of the rights secured to him by the constitution can be effectually restored to him. The complainant asks that the defendant may be enjoined from erecting poles on his land in Belmont avenue, and also from making any use of those erected on his land in Kinney street.

The question on which the decision of the case must turn is this: Has the complainant's land in the street been appropriated to a purpose for which the public have no right to use it? It is of the first importance in discussing this question to keep constantly before the mind the fact that the *locus in quo* is a public highway, where the public right of free passage, common to all the people, is the primary and superior right. The complainant has a right in the same land. He holds the fee subject to the public easement, but his right is subordinate to that of the public, and so insignificant, when contrasted with that of the public, that it has been declared to be practically without the least beneficial interest. Mr. Justice DEPUE, in pronouncing the judgment of the court of errors and appeals in Ho.

Ownership of
land in
street.

boken L. & Improvement Co. v. Hoboken, 36 N. J. Law, 540, 551, said: "With respect to lands over which streets have been laid, the ownership, for all substantial purposes, is in the public. Nothing remains in the original proprietor but the naked fee, which on the assertion of the public right is divested of all beneficial interest." This view was subsequently enforced by the same court in Sullivan v. North Hudson R. Co., 51 N. J. Law, 518, 543, 40 Am. & Eng. R. Cas. 324. Both the nature and extent of the public right are well defined. Lands taken from streets are taken for all time, and, if taken upon compensation, compensation is made to the owner once for all. His compensation is awarded on the basis that he is to be deprived perpetually of his land. The lands are acquired for the purpose of providing a means of free passage, common to all the people, and consequently may be rightfully used in any way that will subserve that purpose. By the taking, the public acquire a right of free passage over every part of the land, not only by the means in use when the lands were taken, but by such other means as the improvements of the age, and new wants, arising out of an increase in population, or an enlargement of business, may render necessary.

It is perfectly consistent with the purposes for which streets are acquired that the public authorities should adapt them, in their use, to the improvements and conveniences of the age. *Morris & E. R. Co. v. Newark*, 10 N. J. Eq. 352, 357. This is the principle on which it has been held that a street railway, operated by animal power, does not impose a new servitude on the land in the street, but is, on the contrary, a legitimate exercise of the right to public passage. Such use, though it may be a new and improved use, still is just such a use as comes precisely within the purposes for which the public acquired the land. Chancellor WILLIAMSON, speaking on this subject in the case last cited, said, in substance (page 358:) The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, subject only to the inconvenience of the railroad, is not such a taking of private property from the owner of the fee of the adjacent land as is prohibited by the constitution. The easement of the highway is in the public, although the fee is technically in the adjacent owner. It is easement only which is appropriated, and no right of the owner is interfered with. While the street is preserved as a common public highway, the use of it does not belong to the owner of the land abutting on it any more than it does to any other individual of the community. The legislature, therefore, does not, by permitting a railroad company to use the highway in

Purposes for
which streets
may be used.

common with the public, take away from the landowner anything that belongs to him. It is not a misappropriation of the way. It is used, in addition to the ordinary mode, in an improved mode for the people to pass and repass. This exposition of the law, so far as it concerns horse railroads, has been approved as correct in all subsequent cases. As I understand the adjudications of this state, this principle must be considered authoritatively established: That any use of a street, which is limited to an exercise of the right of public passage, and which is confined to a mere use of the public easement, whether it be by old methods or new, and which does not tend, in any substantial respect, to destroy the street as a means of free passage, common to all the people, is perfectly legitimate. Such use invades no right of the abutting owners. It takes nothing from them which the law reserved to the original proprietor when his land was taken; it is simply a user of a right already fully vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation.

It is not denied that the railway tracks which the defendant has laid on the complainant's land were placed there by authority of law, nor that the defendant has a legal right to use them in the transportation of passengers, but the complainant's claim is this: That, by the erection of the three poles, his land in the street has been appropriated to a use entirely outside of the public easement, and that it follows, as a necessary legal consequence, that such use constitutes a wrongful taking of his property. Stated more briefly, his claim is that the erection of the poles puts an additional servitude on his land, and attempts to give the public a right in his land, which, as yet, has not been acquired, nor paid for. That the poles will, to a trifling extent, obstruct public travel, and prevent infinitesimal parts of the street from being used as a means of free passage, is a fact which cannot be denied, but there is nothing in this situation of affairs which entitles the complainant to the aid of a court of equity, unless it is made to appear that the nuisance thus created results in some substantial injury to him different from that suffered by the public at large, and that the damage which he will sustain in consequence of the nuisance is irreparable in its character. The rule on this subject is settled. An individual has no right of action in cases of nuisance created by obstructing a highway, unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of the property of the party

Erection of
poles as addi-
tional servi-
tude.

complaining, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530, 537. No irreparable damage is shown in this case. Indeed, I think it may well be doubted whether a sufficient injury is shown to entitle the complainant to maintain a personal action in any court. The bill avers the following facts: That the complainant's premises are used as a japannery, with a present entrance to them from Kinney street; that one of the poles in Kinney street stands about 45 feet distant from the point of entrance, and that the pole, by reason of the slope of the street, makes the passage of wagons to the entrance more inconvenient than it would be if the pole was not there. Now, I am compelled to confess to an utter want of capacity to see how a pole, with a base of 22 inches by 18, standing in the middle of a street 60 feet wide, and distant 45 feet from the point of entrance, can, to any appreciable extent, obstruct or impede the passage of a wagon over the street to the entrance, no matter what the slope of the street may be. It is true there is a very small space in the middle of the street over which a wagon approaching the entrance cannot pass, but it may pass on either side. Besides, the distance of the pole from the entrance renders it very improbable, as it seems to me, that a wagon, in passing from the street to the entrance, would, if there was no pole there, pass over this space 1 time in 50. Certain it is, that, even if it be true that the pole diminishes the complainant's means of access to the entrance, the diminution is so insignificant as to lay no ground or relief in equity.

A doubt as to whether the complainant's land in the street has been appropriated to a purpose for which the public has no right to use it will, at this stage of the cause, be fatal to his claim to an injunction. In a case where the complainant's right is doubtful, and no irreparable damage will result from the doing of the act which he seeks to have enjoined, a preliminary injunction should not be granted. *Hinchman v. Paterson H. R. Co.*, 17 N. J. Eq. 75, 81. The rule on this subject has recently been stated by the court of errors and appeals in a form so lucid and imperative as to remove all doubt respecting the judgment which this court must pronounce on applications of the class just described. This is the form in which the rule is laid down: "It is impossible to emphasize too strongly the rule so often enforced in this court that a preliminary injunction will not be allowed where either the complainant's right, which he seeks to have protected *in limine* by an interlocutory injunction, is in doubt, or where the

No injunction where complainant's right is in doubt.

injury, which may result from the invasion of that right, is not irreparable." *Hagerty v. Lee*, 45 N. J. Eq. 255, 256. The poles have been placed on that part of the complainant's land, where, if their erection constitutes a legal injury at all, they will do the least possible harm. They have been placed on the edge of his boundary line, at a point where, so long as his land remains subject to the public easement, it is not possible for him to make any use whatever of the land. Had they

Owner's right
in sidewalk.

been placed on the sidewalk in front of his premises, rights, growing out of a duty incumbent upon the abutting owner in respect to that part of the street, might have made it the duty of the court to consider questions not at all involved in this case. "A sidewalk," said Chief Justice BEASLEY, in *State v. Newark*, 37 N. J. Law, 415, 423, "has always, in the laws and usages of this state, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises that its improvement may well be regarded as a burden belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground, I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable." And Mr. Justice DIXON, in pronouncing the opinion of the supreme court, in *Weller v. McCormick*, 47 N. J. Law, 397, 400, 11 Am. & Eng. Corp. Cas. 537, said: "Probably, in consideration of the peculiar privilege usually accorded to the owner to use the adjacent sidewalk for stoops, areas, chutes, and other domestic and trade conveniences, he has been held chargeable with the whole expense of maintaining this portion of the road." These utterances show that there is a material distinction between the rights of an abutting owner in the sidewalk adjacent to his premises and those which he may exercise over the other part of the street. I entertain no doubt that that part of the street which has been set apart for public use by means of vehicles may be lawfully applied to uses which would be unlawful, as against the adjacent owner, if exercised, against his will, on the sidewalk which his money has paid for.

The question here, however, is, what are the rights of an adjacent owner in that part of the street in which he holds the naked fee, but which has been set apart, by municipal regulation, for public use by means of vehicles? Mr. Justice HAINES, in speaking of his rights in an ordinary highway, not an urban way, said, in *Starr v. Camden & A. R. Co.*, 24 N. J. Law 592, 597: "He may lay water pipes, gas or other pipes below the sur-

Owners'
rights in
highway.

face ; may excavate for a vault, or dig for mining purposes, and use the soil in any other manner that does not interrupt the free passage over it." In a recent case, heard by the chief justice, and Justices REED and DIXON, Mr. Justice DIXON, in pronouncing the opinion of the court, said, in substance, that an abutter may use the highway in front of his premises, when not restrained by positive enactment, for loading and unloading goods, for vaults and chutes, for awnings, shade trees, etc., but only on condition that he does not unreasonably interfere with the safety of the highway for public travel. The public right is paramount, and includes the right to have the street safe for travel. That of the abutting owner is subordinate. *Weller v. McCormick*, 52 N. J. Law, 470. Some of the rights mentioned in these definitions cannot, as is obvious, be exercised in that part of the street where the poles stand. An awning could not lawfully be put there, nor a chute, nor shade trees. Nor could the privilege of loading and unloading goods be exercised at that point either rightfully or advantageously. As to the other rights mentioned, namely, to lay pipes, to construct a vault, and to mine,—there is not as the case now stands, a word of proof before the court going to show that the poles do or will impair these rights in the slightest degree, or prevent the complainant from exercising them to the fullest extent. The court might very properly, I think, at this point, deny the complainant's application, on the ground that he has shown no such injury as entitles him to relief by injunction ; but, as this course would leave the principal question of the case undecided, it should not, in my judgment, be adopted. The litigants, I think, are entitled to a decision on the question whether or not the complainant's land in the street has been appropriated, by the erection of the poles, to a use not within the public easement. That is the question which received the principal attention of counsel on the argument, and which has occupied the greater part of the time devoted to the consideration of the case.

The right of the defendant to use electricity as its motive power is clear. The defendant was organized under a general statute authorizing seven or more persons to associate themselves together, by articles in writing, for the purpose of forming a corporation to construct, maintain and operate a street railway for the transportation of passengers. Supp. Revision, 363. The motive power to be used by corporations formed under this statute is in no way limited or defined. The statute does not say that they shall use animal, mechanical, or chemical power. It says nothing at all on the subject of power.

Defendant's
right to use
electricity.

Hence, under the general grant of power to maintain and operate a street railway, it would seem to be clear that a corporation formed under this statute takes, by necessary and unavoidable implication, a right to use any force in the propulsion of its cars that may be fit and appropriate to that end, and which does not prevent that part of the public which desires to use the street, according to other customary methods, from having the free and safe use thereof. While the rule is elementary that public grants are to be strictly construed, still it is also well established that where a corporation is authorized, by a general grant, to exercise a franchise or to carry on a business, and the grant contains no words either defining or limiting the powers which the corporation may exercise, it will take, by implication, all such powers as are reasonably necessary to enable it to accomplish the purposes of its creation. I am therefore of opinion that, if there was not other legislation on this subject than that just mentioned, and that it was made to appear that electricity could be used for the propulsion of street cars, without preventing the free and safe use of the street by other means of transportation, the defendant would, by force of the statute under which it was organized, have a right to use electricity as its motive power. But there is other legislation on this subject. Just a month prior to the approval of the statute under which the defendant was organized, another statute was passed, which declares, that any street railway company in this state may use electric motors as the propelling power of its cars instead of horses, provided it shall first obtain the consent of the proper municipal authority to use such motors. Supp. Revision, p. 369, § 30. On the argument it was contended that the legislature meant to confine the grant made by this statute to such corporations as were in existence when the statute was passed, and to exclude such as should subsequently be created. This view was not pressed with much vigor, nor without the expression of doubt. I cannot adopt it. On the contrary, it seems to me that when the two statutes are considered together, as they must be,—for each forms a part of the same legislative scheme, and both were enacted at the same session,—it is made perfectly plain that the legislature meant that corporations formed under the later statute should have the benefit of the grant made by the earlier. The grant, it will be observed, is not limited to such street railroad companies as were in existence when the statute was passed, or as had theretofore been created, but is made to any street railroad company in this state. The grant is general, and was obviously designed to operate in favor of all corporations of the kind described,

whether existing at its date or subsequently created. This construction puts the legislation under consideration in harmony with that provision of the constitution which prohibits the granting of any exclusive privilege to a corporation, and commands that corporate powers of every nature shall be conferred by general laws. By the terms of the statute just construed, no street railway corporation can use electricity as its motive power until it has obtained the consent of the proper municipal authority. The defendant has such consent. It was given by resolution adopted by the common council and approved by the mayor. The complainant contends that consent cannot be given by resolution, and insists that the municipality, in such a matter, can only act by ordinance. But the rule, according to the adjudged cases, is firmly settled the other way, and may be stated as follows: Where a statute commits the decision of a matter to the common council, or other legislative body of a city, and is silent as to the method in which the decision shall be made, it may be made either by resolution or ordinance; or to state the rule in another form, where no method is prescribed in which a municipality shall exercise its power, but it is left free to determine the method for itself, it may act either by resolution or ordinance. One method is just as effectual in point of law as the other. *State v. Jersey City*, 27 N. J. Law, 493; *City of Burlington v. Denison*, 42 N. J. Law, 165; *Butler v. Passaic*, 44 N. J. Law, 171.

Consent of
municipality
—Resolution.

In view of the legislation and the action of the city authorities just discussed, it would seem to be clear that the right of the defendant to use electricity as its motive power, stands, at least so far as the public are concerned, on a sure foundation. The poles and wires are to be used to apply electricity to the motors on the cars. They form a part of what is called the "overhead system." In the present state of the art, they constitute a part of the best if not the only means by which electricity can be successfully used for street car propulsion. The proof on this point is decisive. Thomas A. Edison is perhaps the highest authority on this subject in this country. He says, in an affidavit annexed to the defendant's answer, that the only method of applying electricity for street car propulsion, which up to the present time, has proved successful, electrically and commercially, is what is known in the art as the "overhead system, whereby electricity is supplied to the motors on the cars from wires suspended above the cars. Other electricians say the same things. The proofs also show that there are over 200 electric street railways in the United States, either in operation

Poles and
wires do not
impose new
burden.

or in course of construction, and that of those in operation, nearly all used the overhead system. That, according to the proofs, is the best system, and the one in general use, and the only one which, as yet, has proved successful. The facts just stated are in no way controverted, so, as the proof now stands, the court is bound to declare, as an established fact, that the poles and wires are, in the present state of the electric art, necessary to the successful operation of the defendant's railway by electricity. The poles and wires are to be used as helps to the public in exercising their right of passage over the street. They form part of the means by which a new power, to be used in the place of animal power, is to be supplied, for the propulsion of street cars, and they have been placed in the street to facilitate its use as a public way, and thus add to its utility and convenience. The whole matter may be summed up in a single sentence,—the poles and wires have been placed in the street to aid the public in exercising their right of free passage over the street. That being so, it seems to me to be clear beyond question that the poles and wires do not impose a new burden on the land, but must, on the contrary, be regarded, both in law and reason, as legitimate accessories to the use of the land for the very purposes for which it was acquired. They are to be used for the propulsion of street cars, and the right of the public to use the street by means of street cars, without making compensation to the owners of the naked fee in the street, is now so thoroughly settled as to be no longer open to debate. It would seem then to be entirely certain that the occupation of the street by the poles and wires takes nothing from the complainant which the law reserved to the original proprietor when the public easement was acquired. This view is in strict accord with the uniform current of judicial opinion on this subject. The question presented here for judgment has already been considered by the supreme court of Rhode Island, in *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 43 Am. & Eng. R. Cas. 208, and, by the circuit court of the United States for the eastern district of Arkansas, in *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556, 43 Am. & Eng. R. Cas. 215, and by local courts in Kentucky, Ohio, and Indiana; and, in each instance, the decision has been that the placing of the poles and wires in the street for the purpose of propelling street cars by electricity did not impose a new servitude on the land, nor appropriate the land to a use not within the public easement. The decision in these cases was placed upon this manifestly just principle: That the question, whether a new method of using a street for public travel results in the imposition of an additional burden on the land or

not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The use is the test and not the motive power. And this principle exhibits, in a very clear light, the reason why it has been held that the placing of telegraph and telephone poles in the street imposes an additional servitude on the land. They are not placed in the street to aid the public in exercising their right of free passage, nor to facilitate the use of the street as a public way, but to aid in the transmission of intelligence. Although our public highways have always been used for carrying the mails, and for the promotion of other like means of communication, yet the use of them for a like purpose, by means of the telegraph and telephone, differs so essentially in every material respect from their general and ordinary uses that the general current of judicial authority has declared that it was not within the public easement. Massachusetts has, however, by a divided court held otherwise. *Pierce v. Drew*, 136 Mass. 75.

The authority on which the complainant principally relies to maintain his right to an injunction is the judgment of the court of errors and appeals in *Wright v. Carter*.

That case arose out of the following facts: The legislature authorized a turnpike company to construct its turnpike on a public highway, but directed that the highway should be vacated before the construction of the turnpike was commenced. The object of this direction was not to discharge the land from the public easement, but to relieve the public from the duty of keeping the highway in a proper state of repair, and to impose that duty on the turnpike company. The highway was vacated, and the turnpike constructed. After the turnpike was completed, the company built a house for its gatekeeper within the limits of the highway, and on land in which the plaintiff held the naked fee. The plaintiff then brought ejectment. His action was based on the notion that the vacation of the highway discharged his land from the public easement, and that after the easement had once been discharged, it was not within the power of the legislature to reimpose it without making provision that compensation should be made. He also insisted that even if the public easement still endured, a new servitude had been imposed on his land by the erection of the house. The supreme court held both his positions to be unsound, and gave judgment for the defendant. 27 N. J. Law. 76. This judgment was carried to the court of errors and appeals and there reversed. No opinion appears to have been written, but the ground of the reversal is given by Chief Justice BEASLEY in *State v. Laverack*, 34 N. J. Law,

*Wright v.
Carter distin-
guished.*

201. On page 208 he says: "I have always understood that the view of the supreme court, touching the legislative right to convert the public highway into a turnpike, was concurred in by the higher court, and that the point of dissent was with regard to the privilege which had been sanctioned of putting the toll house on the property of the land owner." The chief justice also expresses it as his judgment that the erection of the house "was an invasion of the property of the land owner, because, to this extent, it put an additional servitude upon his property. While the land was a public highway, such a building could not have been erected. Consequently, when such land was converted into a turnpike, to authorize such an erection was to give to the public a new use in such land." Wright v. Carter and the case under consideration differ, it will be noticed, in every essential feature, except that they both relate to a public way. The house could, under no possible condition of circumstances, be used as an instrument to aid the public in exercising their right of free passage. It was not erected for any such purpose, but, on the contrary, with the obvious design to withdraw permanently and entirely from public use, as a means of passage, that part of the way which it covered. The poles and wires have been erected for an entirely different purpose, in fact for a purpose which is the exact opposite of that just stated. They are designed to facilitate the use of the streets as means of public passage, and thus increase their utility and convenience to the public. But I do not believe it is possible to imagine any condition of facts which would make it lawful to erect a building to be used as a dwelling in a public way. Such use of the land would undeniably be entirely foreign to the purposes for which it was acquired. There can however be no doubt, I think, that erections may be lawfully made in the streets of a city for the purpose of lighting them. They must be lighted at night to make their use safe and convenient, and to prevent lawlessness and crime. By the charter of Newark, power is given to its governing body, by express words, to light the streets, parks, and other public places. I have no doubt that in virtue of this power, the city has the right to erect poles in the street just where the poles in question are. The poles in question are in fact to be used for the purpose of lighting the street. One of the conditions on which the city gave its consent to the erection of the poles is that the defendant shall place on every other pole a group of 5 incandescent lights, of 16 candle power each, and furnish such light every night. This use of the poles and wires would, in my judgment, legalize their erection, but this is not their primary use. They

Necessary
erections in
streets.

were erected primarily and principally to facilitate the use of the street, and add to its convenience as a public way, and it is upon this ground that I think it should be declared that their presence in the street invades no right of the complainant.

The averment that the use of electricity by the defendant, as its propelling power, will render the street so extremely dangerous as practically to destroy it as a public way for any other use than that which the defendant may make of it, is not supported by the proofs. On the contrary, I think it is very clearly shown that an electric current of the volume the defendant will use, may be used with entire safety to everybody. The complainant's application must be denied with costs.

Construction of Electric Railways in Streets.—See *Cumberland Telephone & Telegraph Co. v. United Electric R. Co.*, (C. C.), 43 Am. & Eng. R. Cas. 194; *Taggart v. Newport St. R. Co.*, 43 *Id.* 208.

Same—Right of Abutting Owner to Injunction.—In *Potter v. Saginaw Union St. R. Co.*, (Mich., Nov. 21, 1890), 47 N. W. Rep. 217, it appeared that plaintiff owned a vacant piece of ground lying along a street and extending across the square so as to front upon the cross streets. It was chiefly valuable for residence purposes, and he intended to build a residence thereon. Without objection from him, defendant company constructed and operated an electric railway, with an overhead wire, along one of the cross streets, and was about to put in operation a similar road upon the side street, upon a track long used for horse cars, fastening its crosswires to electric light poles already erected, so that no new poles or tracks were placed in front of the premises. Defendant had expended about \$70,000 in constructing its system of electric railways in the city. There was evidence that there would be some danger to men and animals from the electric current, and from the more rapid running of the cars, and that the current would interfere with telephone wires in the same street. *Held*, that no present injury was shown, the apprehended injury was too remote, and, under all the circumstances, plaintiff was not entitled to an injunction against the operation of the road. The court said: "It is not every case of injury to real estate of a permanent character that equity will enjoin, and the court will look to all the facts and circumstances and grant or withhold relief as the justice or equity of the case may require. *Hall v. Rood*, 40 Mich. 46; *Buchanan v. Grand River & G. Log Running Co.*, 48 Mich. 364; *City of Big Rapids v. Comstock*, 65 Mich. 78; *Blake v. Cornwell*, 65 Mich. 467; *Miller v. Cornwell*, 71 Mich. 270. In this case the granting of an injunction would cause defendant a great many times more loss than complainant will suffer, if all his apprehensions prove true in the use of electricity to propel cars. Besides, if he has the rights claimed by him, he has a remedy at law for their violation, and he should, so far as the facts are now developed, be left to that remedy. For these reasons we do not consider that it is necessary to discuss or decide the points raised and elaborately argued by the counsel for the complainant in this case. He has not shown an infringement of an absolute right which calls for the interposition of a court of equity in his behalf. The decree of the court below must be affirmed, with the costs of both courts."

In *Barber v. Saginaw Union St. R. Co.*, (Mich., Nov. 21, 1890), 47 N. W. Rep. 219, which was a suit to enjoin the construction and operation of an

electric street railroad, it appeared that complainant owned premises on the corner of two streets; that, at the corner diagonally opposite said premises, the railroad turned from one street to the other, but that, assuming complainant's premises to extend to the middle of the streets, said railroad nowhere came within 10 feet thereof. The trolley wire curved with the track, and was over the center of it. When the suit commenced, a sustaining wire extended from the trolley wire at the curve, and was attached to a pole standing between the sidewalk and the paved street in front of complainant's lot. This pole was stayed with a wire running to a guypost set in the ground in front of said lot. Thereafter defendant removed the wires and poles. *Held*, that a decree perpetually enjoining defendant from erecting within the street limits, on and in front of complainant's premises, any poles, posts, or wires, for operating its cars by electricity, without complainant's consent, gave complainant all the relief she was entitled to.

Right of Abutting Owner to Compensation for Construction of Horse Railway.—In *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320, it was held, that under the provision of the Georgia Constitution, that private property shall not be taken or damaged for public use without just compensation, the owner of property abutting upon a street along which a street railway has been laid, and which is specially damaged by the construction or operation of such railway has a right to recover, although his property has not been taken. And the fact that the track is laid too near the plaintiff's premises is not a ground of recovery of damages. *SIMMONS, J.*, said: "The construction and operation of a horse railway in the public streets of a city, by authority of the legislature and the consent of the city government, whether it be or not a new burden imposed upon the streets, does not entitle a private individual to compensation therefor unless the construction or operation of such railway works special damage to his property. If special damage is caused to property along the line of such railway by the construction or operation thereof, in our opinion the owner of the property is entitled to recover the amount of the damages which his property has actually sustained. Applying this rule to the case at bar, we find that the declaration asserts, in substance, that the plaintiff, by reason of the construction and operation of this railroad, was virtually deprived of ingress and egress to and from his property, and that his property, for the reason aforesaid, was damaged to the extent of \$2,000. If these allegations are true, (and the demurrer admits them to be true for the purposes of this case), we do not see why the plaintiff would not be entitled to recover. The supreme court of Ohio, in the case of *Cincinnati & S. G. Ave. St. R. Co. v. Cummins*, 14 Ohio St. 523, in discussing this subject uses the following language: "There exists in the owners of adjoining lots a private right to free access to their lands and buildings from the street, as the same was and would have continued to be according to the mode of its original use and appropriation by the public, and there can be no change of such mode and adaptation of the street to new vehicles and methods of carriage and transportation which shall materially impair or destroy such right, unless by the consent of the owners, or upon the payment of due compensation to them." The supreme court of Wisconsin, in the case of *Hobart v. Milwaukee City R. Co.*, 27 Wis. 200, after copying the above extract, approves it as follows: "It is a doctrine which imposes no unreasonable restriction upon the rights of the public in the use of its streets and highways, and which at the same time affords that protection to private or individual rights which the spirit and principles of our constitution and form of government require. It is possible, as has been suggested, that it may sometimes prove embarrassing in practice to determine when and to what extent the private rights of adjoining owners have been infringed."

but such embarrassments are inseparable from the consideration and determination of all similar questions. The difficulties in the way of ascertaining and determining them by no means disprove their existence or show that they ought not to be recognized and enforced.' We quote these extracts with approval, and think they are even more applicable in this state than in those states, because the new rule as to damage to private property is not expressly embraced in the constitutions of those states."

VOSE

v.

NEWPORT STREET R. CO.

(*Rhode Island Supreme Court, July 26, 1890.*)

Railway in Street—Damages Resulting From Laying of Rails—Construction of Charter.—The charter of a street railway company provided that "whenever any estate abutting upon a street or highway, upon or over which the rails of said corporation shall be laid, shall be injured thereby, the said corporation shall be liable to pay the owner or owners thereof the damages thereby occasioned to said estate." *Held*, that an owner of abutting property is only entitled to recover damages for injuries resulting from the laying of the rails, as distinguished from those resulting from the use of them as laid.

ON demurrer.

Arnold Green and Patrick J. Galvin, for plaintiff.

Francis B. Peckham and Darius Baker, for defendant.

DURFEE, C. J.—This action is brought for the recovery of damages under the eighth section of the defendant company's charter, which reads as follows, to-wit:

"Section 8. Whenever any estate abutting on a Case stated. street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby the said corporation shall be liable to pay the owner or owners thereof the damages thereby occasioned to said estate." The declaration sets forth that the plaintiff is, and has been long, the owner in fee of a lot of land, with a dwelling house and other buildings and improvements thereon, situated in the city of Newport, on "Bath Road," so called, on and over which the rails of the company have been laid, worth \$25,000, when the rails were laid, *i. e.*, in April, A. D. 1889, and constantly increasing in value, which estate "was a source of great income to the plaintiff as a summer home and fashionable boarding place for well to do summer residents, and for well to do temporary visitors, who have made, and who desire to make, their homes at said dwelling house; that the laying of the rails, and using the rails so laid, has injured said estate, which

injury has impaired the market and rental value thereof, and deprived the plaintiff of its use as aforesaid, and of the income and profit of said use." A second count alleges damages by reason of the refusal of the plaintiff's guests and boarders of A. D. 1889 to renew their contracts for board and entertainment for the ensuing season, as they had been accustomed to do, the reason given for such refusal being the laying of said rails. The company demurs.

The plaintiff claims that, under said § 8, he is entitled to damages for any injuries, direct or consequential, past or prospective, which he has sustained or may sustain as abutting owner, whether they result from the laying of the rails or from the use of the rails for travel. The company contends that under said section it is liable only for damages for some

Damages resulting from laying rails only recoverable.

direct physical injury to the estate, regarded as a material body, caused by the laying of the rails, and cites numerous cases. It seems to us that the best way to ascertain the meaning of the section is to give careful attention to its language. The company has pointed out that the language does not purport to give any claim for damages for injuries resulting from the mere using of the rails. This is clearly so. It is only by construction, if at all, that such claim can be allowed. We do not find any warrant for such a construction. Sections in the same words are to be found in the several horse railway charters granted by our general assembly, and we are not advised that such a construction has been claimed for any one of them. The use of streets and highways for travel by such railways, under legislative sanction, has been long recognized as legitimate, and we have recently decided, in a case against the defendant company, that the employment of electricity, instead of horses, as a motor, makes no difference, (*Taggart v. Newport St. R. Co.*, 14 R. I. 668, 43 Am. & Eng. R. Cas. 208); and therefore we think the defendant company is not to be held to liability for injuries and arrangements resulting from such use, in the absence of language more manifestly imposing it. The language is: "Whenever any estate abutting on a street or highway upon or over which the rails of said corporation shall be laid shall be injured thereby." Evidently the injury for which damages are recoverable is either injury from the rails as laid, or injury resulting from or incident to the laying of them. It seems so to us that the injury contemplated was unquestionably of the latter kind since the mere existence of the rails in a street or highway would not do any appreciable harm to an abutting estate. If this be so, was it simply a direct and physical injury which was contemplated?

To hold so would be, in our opinion, to construe the section too strictly. A statutory provision would seldom, if ever, be necessary to enable an abutter to recover damages for such an injury. We are of opinion that under the section the owner is entitled to damages for injuries resulting from the heaping of dirt or materials on the sidewalk so as to close or materially obstruct the access to his dwelling house or shop. Such an injury would be temporary, but it would be an injury to the estate. If the street were excavated so as to lower the grade the injury would or might be more permanent, but if authorized by the act of incorporation, we think the abutting owner would be entitled to damages for it under said section. And so there may be other injuries, doubtless, without physical contact or encroachment. The declaration does not show that any of the injuries complained of by the plaintiff are injuries resulting from the laying of the rails, as distinguished from those resulting from the using of them as laid. So far as appears the injuries complained of are of the latter kind. We think the plaintiff in order to maintain his action should make it appear expressly that he has suffered injury to his estate from the laying of the rails. Demurrer sustained.

Measure of Damages for Taking of Street for Railroad.—Where the fee of one half of a street is in the plaintiff, the measure of damages for the taking of the street by a railroad company for its road is the value of plaintiff's interest in the land taken when the railroad company entered to construct its road, subject to the easement for a public street, and the measure of damages to a lot not taken abutting the street is the difference between its value at the time the railroad company entered to construct its road, and its value when the road was completed. If there was no depreciation in the value of such lot when the road was completed, there has been no damage, and none can be allowed. *Muller v. Southern Pac. B. R. Co.*, 83 Cal. 240.

Damages to Which Abutter is Presumptively Entitled.—One whose land in a street in front of his lot is appropriated by a railway company and occupied by its track, is presumptively entitled to damages in addition to what he would suffer if the road stopped at the line of his lot, and no part of the same was so appropriated. *Papooshek v. Winona & St. P. R. Co.*, 44 Minn. 195.

Depreciation Caused by Operation of Railroad in Street as Element of Damages.—Any depreciation in the value of residence property occasioned by the probability that a railroad company, in operating and using its road constructed in a street will make unusual and loud noises, and emit from its engines smoke and cinders, and cause other like annoyances naturally incident to the operation of cars, is a proper element to be considered in estimating damages to such property by the location and operation of the road. *Fort Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281.

Matters to Be Considered in Arriving at Value of Abutting Land Injured by Construction of Railroad.—In arriving at the value of land abutting upon a street and injured by the construction of a railroad therein, its capabilities or the uses to which it is adapted should be considered, and the same considerations are to be regarded as in a sale of land between private par-

ties. The fact that the lot is rendered less valuable for the particular business for which the owner is using it, by reason of the taking of the street in front of it by the railroad company may be considered on the question of damages. *Muller v. Southern Pac. B. R. Co.*, 83 Cal. 240.

Speculative Damages to Lot Abutting on Street not Recoverable.—Evidence as to what the value of a lot would have been had the railroad been built upon another street is not admissible to show the damage to the lot, since the damage to be allowed is not a failure to realize a profit which, under another state of matters, might have been realized, but the loss actually suffered, and it is error to refuse to instruct the jury that such supposed value cannot be considered. *Muller v. Southern Pac. B. R. Co.*, 83 Cal. 240.

Damages for Construction of Road through Other Parts of Street not to be Considered.—In *Demueles v. St. Paul & N. P. R. Co.*, 44 Minn. 436, it was held that in assessing damages to the owner of land abutting upon a public street for the construction and maintenance of a railroad in that part of the street opposite the plaintiff's premises, damages are not too general to be included for the construction and maintenance of the railroad through other parts of the street. Following *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 36 Am. & Eng. R. Cas. 7.

Evidence as to Effect of Railroad on Value of Property.—In such an action, he may recover damages necessarily resulting from the ordinary and proper use by the railroad company of its track in such street, and may give evidence developing the character of this ordinary and proper use, and how it affects the value of his property. *Fox v. Baltimore & O. R. Co.*, (W. Va., Dec. 12, 1890), 12 S. E. Rep. 758.

Evidence as to Value of Property.—In estimating the permanent damage, the jury may inquire into the value of the property, and, as a guide or assistance in so doing, it is not improper to hear evidence of its rental value or of an offer to purchase, which the plaintiff has refused. *Fox v. Baltimore & O. R. Co.*, (W. Va., Dec. 12, 1890), 12 S. E. Rep. 758.

Recovery of Permanent Damages for Construction of Road—Adoption by Defendant of Rule of Measurement—Waiver of Exceptions Conflicting with Rule.—In *Porter v. Metropolitan El. R. Co.*, 120 N. Y. 284, which was an action to recover damages for injury to plaintiff's property by the erection of an elevated railroad in the street upon which such property abutted, it appeared that at the trial the defendant requested a charge to the effect that plaintiff was not entitled to recover for loss of rent, and could only recover loss in the value of the property. It was held that this request constituted an adoption by defendant of the rule of measurement which would result in the determination by the jury of permanent damages, and the instruction requested being given, the defendant waived any previous exceptions conflicting with the rule.

Construction of Additional Track in Street—Damages—Matters in Issue.—In *Jackson v. Ackroyd*, (Colorado, Feb. 20, 1891), 25 Pac. Rep. 132, the action was brought to recover damages to property abutting upon a street in which a railroad was constructed. The complaint alleged that the railroad was originally built prior to the time that plaintiff acquired title, and that in addition to such construction the receiver of the railroad had constructed an embankment, and it was for such addition that the plaintiff claimed damages. At the trial the court charged the jury as to the measure of damages for injuries caused by the construction of the embankment in the first instance. It was held, that the instruction was erroneous, the only matter in issue being the question of damages caused by the construction of the addition by the receiver.

Excessive Damages for Construction of Railroad in Street.—In *Gulf, C. & S. F. R. Co. v. Necco*, (Texas Sup. Ct., March 21, 1891), 15 S. W. Rep. 1102,

the action was brought to recover damages occasioned to plaintiff's property abutting upon a street occasioned by the company's laying a number of additional switch tracks. The plaintiff testified that his property was worth \$6,000 before these additional tracks were laid: that it had depreciated nearly fifty per cent. because of the smoke, soot, and cinders constantly filling his house, the obstruction of the passage to and from his premises, and the disturbing noises made day and night. *Held*, that a verdict for \$2,000 was not excessive.

HENDERSON *et al.*

v.

OGDEN CITY R. Co. *et al.*

(*Utah Supreme Court, April 1, 1891.*)

Mandatory Injunction—Construction of Street Railway.—The district courts of Utah have the power, in proper cases, to issue a mandatory, as well as a preventive injunction. The obstruction of the roadbed of a street railway company may be enjoined by a writ which is restorative as well as preventive.

Authority of Municipality in Territory to Grant Franchise to Street Railway Company—Act of Congress.—The City of Ogden, Utah, is not precluded from granting, under general laws of the territorial legislature, the right to lay down railway tracks through its streets, by the Act of Congress of July, 30, 1886, providing that territorial legislatures shall not pass local or special laws "granting to any corporation, association, or individual the right to lay down railroad tracks" and "granting to any corporation, association, or individual, any special or exclusive privilege, immunity, or franchise."

Right of Individual to Construct and Operate Railroad.—There is no statute or rule of law in force in the territory of Utah to prevent an individual from constructing and operating a railroad; and a license granted by a city for the construction of a street railway is not invalid because given to an individual.

Franchise of Street Railway Company—Exclusive Right to Use Streets.—The grant to a street railway company of the right to lay its tracks in the streets of a city, is not exclusive, and does not prevent the city authorities, when public interest demands it, from granting to others the right to use the same streets for a similar purpose.

APPEAL from District Court, First District.

L. R. Rhodes and T. J. Hudson, for appellants.

H. P. Henderson and Ogden Hiles, for respondents.

ZANE, C. J.—This is an appeal from an order granting an injunction restraining the defendants from incumbering the alleged roadbed of the plaintiff's street railway, and from permitting the incumbrance placed thereon by them to remain. The order was made upon the com- Case stated.

plaint and answer, the oral testimony, and documentary evidence, and after the argument of the solicitors of the respective parties had been heard. The facts of the case, so far as we deem it necessary to state them, are as follows: On the 7th day of August, 1883, the city council of Ogden City adopted a resolution giving to the Ogden City Railway Company permission to construct and operate on Washington avenue a single or double tracked street railway. The resolution contained the following, with other, conditions: "In case such company shall not commence and prosecute the construction of its road as mentioned in this resolution, and shall not prosecute its extensions thereafter at least one mile every four years, the city reserves the right to grant to others the privilege of constructing railways upon all streets or parts of streets not actually occupied by Ogden City Railway Company's tracks." In pursuance of the resolution the company built a single line of railway track on Washington avenue, and in all respects complied with the resolution. The other defendant claims as mortgagee of the Ogden City Railway Company, and is acting under the rights thus acquired. On the 19th day of September, 1890, the plaintiffs obtained from Ogden City permission to lay a single or double track electric railway on Washington avenue and other streets of the city. Under this permission the respondents commenced the construction of their railway on the east side of the street, and on that portion unoccupied by the appellant's track, and laid down a part of it, and excavated and prepared other portions of the roadbed thereof, when the appellants took possession of it, and put ties and other obstructions thereon. The respondents filed their complaint to enjoin the alleged trespass and incumbrances, and upon a hearing upon an order to show cause the court granted a temporary injunction, that was restorative as well as preventive.

The contentions of the solicitors as to the rights of the parties upon the foregoing facts impose upon the court the consideration and decision of the following propositions: (1) Was the order appealed from erroneous because it was mandatory as well as preventive? (2) Was the permission given to the respondents to lay down their track contrary to the act of congress prohibiting the territorial legislature from granting special or exclusive privileges? (3) Was the license under which the plaintiffs were constructing their railway invalid because given to individuals? (4) Under the resolution, was the appellant's right of way exclusive?

As to the first proposition: While it is undoubtedly true

that injunctions are usually employed to prevent future injuries, they are sometimes granted to restore rights that have been lost. When the advantage to the wrongdoer that constitutes the injury has been gained surreptitiously or by fraud, and the retention of it constitutes a continuing injury, and the law affords no adequate remedy, equity will not withhold such remedial process. In such exigencies mandatory injunctions may issue on interlocutory applications. 1 High, Inj. (3d Ed.) §§ 2, 708. The evidence in the record shows that the plaintiffs while engaged in constructing their road, suspended work during Sunday, and that the appellants in the interval took possession of it, and placed wooden ties and other obstructions upon it, and that the trespass was a continuing one, for which an action at law would not have an adequate remedy. But counsel insist that the statutes of Utah only authorize a preventive writ; that a mandatory one is not included. The statute is as follows: "An injunction may be granted in the following cases: (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually." 2 Comp. Laws Utah 1888, § 3300. This statute provides that the commission or the continuance of the act may be restrained. By suffering their property to remain on respondents' roadbed the appellant continued the wrong. The act of placing it there had been done, but appellants were still occupying plaintiff's works with their ties and other property. They were continuing the trespass. To prevent that continuation a mandatory injunction was necessary. We are of opinion that the legislature, by the law referred to, did not intend to deprive the courts of Utah of any part of that equitable jurisdiction with respect to injunctions recognized by that beneficent system of rules which constitutes equity. We hold that the district courts of Utah have the power, in proper cases, to issue mandatory as well as preventive injunctions.

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tions.

With respect to the second proposition: The act of congress of July 30, 1886, is as follows: "The legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases." And after mentioning a number of subjects, the following language is used: "Granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose. Granting to any corporation, association, or individual any

Grant of fran-
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—Act of con-
gress.

special or exclusive privilege, immunity, or franchise whatever." The first clause quoted prohibits the territorial legislature from granting to any corporation, association, or individual the right to lay down railroad tracks; and because the legislature could not grant to any corporation or individual such right it is argued that Ogden City could not give such permission. If that were so, then there would be no way by which any company or individual could obtain the right of way for a railway on any street in Ogden City or any other city in the territory, because there would be no other authority to which application could be legally made. The second clause above quoted prohibits the granting of any special or exclusive privilege, immunity, or franchise whatever by the legislature; and if the legislature may not enact a general law in pursuance of which a franchise may be secured in each case by application to the courts, (as it has done,) then no more companies can be incorporated in the territories. And if the rule is that the city cannot grant the right of way to any particular company or person because the legislature cannot do so itself, that rule is equally applicable to a large number of other subjects as to which it cannot act specially. As instances, the legislature cannot grant divorces, or change the names of persons; and if it cannot by general laws authorize some other tribunals or some officers or offices to exercise the necessary authority, then no more divorces can be granted or names changed; and so as to a great many other subjects. Upon a careful examination of the law under consideration the intent of congress is apparent. The law was designed to prohibit special legislation, and to prevent the evils thereof. The purpose was not to prevent the legislature from enacting general laws in pursuance of which such special duties might be performed by some other tribunal or by some officer. We are of the opinion that the city council of Ogden City, in the exercise of a reasonable discretion, may grant the right to lay down railway tracks in its streets.

The consideration and decision of the third point involves the right of natural persons as such to construct and operate railroads. In the nature of things is there any sufficient reason why individuals, as such, should not be permitted to construct and operate railroads as well as natural persons through the instrumentality of corporations? A private corporation is a legal person, with power to act as a natural one to the extent that its charter authorizes it to. When the road is owned and operated by a corporation the stockholders own the road through the agency of the corporation, but the use is in the public. When individuals, as such, own and operate it, the

Right of individual to construct railroads.

property is in them, and the use is then in the public. In the first case, the proceeds of the business, after deducting expenses, is paid to the stockholders as dividends. In the latter, the individuals retain such earnings as are not consumed by expenses. Either can acquire the right of way by contract or in the exercise of the right of eminent domain when the law authorizes it; and neither can acquire it in the latter way without such a statute. The rights of natural persons through the instrumentality of corporations are usually limited to one department or class of business; but without such instrumentality their rights extend to every field which their enterprise, their skill, or business capacity and inclinations may enable and cause them to enter. We do not find anything in business methods or in the fitness of things to prevent natural persons from constructing and operating railroads when they have the inclination, and can command the pecuniary means to do so; nor do we know of any statute in force in Utah, or any rule of law or adjudged case, against it. 1 Rorer, R. R. 8.

Lastly, was the appellants' right of way on the street exclusive? Equality before the law is a fundamental principle of all just governments. Competition in supply and demand regulates wages, prices, and values. The moral sense, the self interest, and the inclinations of mankind amid the employments, pursuits, and transactions of civilized life give to competition this effect. It is the response of nature to the interrogations of human affairs. It is an important principle of that philosophy known as "political economy;" and laws preventing competition are usually regarded as contrary to public policy, and held to be of no effect. But sometimes the conditions of a particular business prevent competition. Reasonable tariffs and rates might enable one railway to accommodate the public when insufficient to support two or more; and one railway on a street might be sufficient to accommodate the travel on it; but it might be convenient for travel coming in from different neighborhoods to pass to a business centre or other neighborhood on the same street for short distances, and they should be permitted to occupy a reasonable portion of it for that purpose. They should not be allowed to obstruct travel in other ways, or to interfere with the approaches to abutting property. To prevent this they should be confined to the common use of the same track. This could be accomplished by the imposition of suitable conditions at the time of granting the permission, or, when such conditions have not been exacted, by a resort to the law of eminent domain. Streets can only be occupied by railroads for public uses, not for private. Railways are permitted on the streets because they

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privilege not
granted. •

are believed to be beneficial to the public in furnishing a prompt, economical, and convenient mode of travelling upon them; and being in the public streets, the public, through its authorities, the city government, has a right to direct the location of their tracks therein, and to determine how much of the streets they may occupy; and such public authorities have also the power to adopt reasonable rules for the regulation of their business. Such railroads and their business are subject to the police power, which the government cannot divest itself of by contract or otherwise, and, being so possessed of it, it is its duty to make use of it whenever the public good demands that it shall. The legislature did not authorize the city council of Ogden City to grant to the appellants the exclusive right of way upon the street in question, nor do we think it had the power to do it. *Elliott, Roads & S.* 565, 566; *Jackson Co. Horse R. Co. v. Interstate Rapid Transit R. Co.*, 24 Fed. Rep. 306. We find no error in this record. The judgment of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

Street Railway—Authority to Grant Exclusive Privilege to.—See *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.* (Ind.), 43 Am. & Eng. R. Cas. 234; *Canal & C. St. R. Co. v. Crescent City R. Co.* (La.), 40 *Id.* 329; *Teachout v. Des Moines Broad Gauge St. R. Co.* (Iowa), 36 *Id.* 108, note 116.

Right of an Individual to Maintain and Operate a Railroad.—The right to build, own, manage, and run a railroad and take the tolls thereon, is not, of necessity, of a corporate character, or dependent upon corporate rights. It may belong to, or be enjoyed by natural persons, and there is nothing in its nature inconsistent with its being assignable. *Bank of Middlebury v. Edgerton*, 30 Vt. 182. "Any one or more natural persons have the same right to build and operate a railroad, and to carry passengers and freight thereon for pay, and to charge, and enforce collection of, passage-money and tolls therefor, that they have to run a stage coach or a wagon for accommodation of the public, or to build and run a mill, or a boat, or to engage in any other business, and to charge and collect compensation for the services rendered; and may regulate and fix their own prices, rates and tolls, in the same manner as common carriers ordinarily may. If in so doing they hold themselves out to the public as common carriers, they will be deemed such in law, and will be subject to the law of common carriers as to the rights and obligations of themselves and the public in reference to their business transactions as such." 1 *Rorer on Railroads*, p. 8. "Any person may build a railroad upon his own land, or upon the land of others with their consent, and may operate the same by steam, or any other power he pleases." 1 *Wood's Railway Law*, § 2, citing *Stewart's Appeal*, 56 Pa. St. 413; *McCandliss' Appeal*, 70 Pa. St. 210; *Bishop v. North*, 11 Wall. (U. S.), 429; *Dand v. Kingscote*, 6 Wall. (U. S.), 174; *Durham, etc., R. v. Walker*, L. R. 2 Q. B. 940; *Brand v. Hammersmith & C. R. Co.*, L. R. 2 Q. B. 223. In the case of *Junction R. Co. v. Ruggles*, 7 Ohio St. 1, the court say: "Had the persons composing the Ohio Railroad Company been nothing more than an unincorporated partnership, it would have been fully competent to make the contract with Ruggles which it did make, to have vested in it the easement which he conveyed; and, as against Ruggles, fully to enjoy that easement; that is to say, it would have been com-

petent to construct a railroad over the land covered by the easement, and to run trains of cars over it, at will, from end to end."

But a railroad company authorized to build a railroad, and failing to obtain the means, has not the power to contract with an individual to build a railroad solely for his own use on a part of their route, and such individual cannot build such road. *Stewart's Appeal*, 56 Pa. St. 413.

And according to Mr. Wood, an individual constructing and operating a railroad does so at his peril, and has none of the privileges and immunities which are possessed by corporations created for that purpose by the legislature, and he is liable for all injuries arising either to the property or person of another by the operation of such road, and for all nuisances arising from the noise, smoke, or other consequences of operating the road; he is not only liable in damages, but also to indictment, where the nuisance is injurious to the public. 1 *Wood's Railway Law*, § 2.

OGDEN CITY R. CO.

v.

OGDEN CITY *et al.*

(*Utah Supreme Court, April 1, 1891.*)

Electric Street Railway—Exercise of Right of Eminent Domain.—The right of eminent domain may be exercised in proper cases in behalf of electrical street railways, under a statute authorizing the exercise of the right in behalf of steam and horse railroads.

Same—Grant of Franchise by City to Two Companies for Same Street—Injunction.—A city granted an electrical street railway company the right to lay a double track in a street in which it had already granted another company the right to lay a double track. Before the electrical company commenced work, the company having the prior grant sued to enjoin them from laying their tracks, and to have the ordinance granting the franchise declared void, alleging that it had constructed a single track, and that if it were to lay down its other track, and the electrical company their two tracks, other modes of public travel would be obstructed, and that the poles and wires of the electrical company would interfere with plaintiff's right as the owner of property abutting on the street. *Held*, that the allegations were not sufficient to warrant an injunction.

APPEAL from District Court, First District.

L. R. Rhodes and T. F. Hudson, for appellant.

A. R. Heywood, H. P. Henderson and Ogden Hiles, for respondents.

ZANE, C. J.—The complaint filed in the court below in this case, among other things, alleged that on August 7, 1883, the city council of Ogden City adopted an ordinance granting to the plaintiff permission to lay down a double tracked street railway on Twenty-Fifth street and Washington avenue, and that in June, 1890, the city, upon certain conditions named in the ordinance, gave the defendants permission to construct a double track railway on the

Case stated.

same streets, to be operated by electricity; that these are the main business streets of the city; that the plaintiff had constructed on them a single track, with turnouts; that, if it were to lay down another, the two would occupy about 20 feet in width; and that, if two additional tracks, as threatened by the defendants, should be laid down, the streets would be so obstructed by the four tracks as to greatly interfere with other modes of travel; and that, if poles and wires, as threatened, should be placed in front of the property owned by plaintiff, it would be seriously damaged thereby. The complaint prays that the ordinance granting the permission to defendants to lay down their tracks may be declared null and void so far as it purports to grant to defendants any right to construct their road on the streets, and that they may be enjoined from filing the bond exacted as one of the conditions of the permit. A prayer for general relief is also added. To the complaint the defendants interposed a demurrer, which the court below sustained, and also refused an injunction. From the decision of the court the plaintiff has appealed to this court, and assigns it as error.

The points urged by plaintiff upon the argument of this appeal call for a consideration of the authority of the city council to give permission to individuals and corporations to construct railways upon the public streets, and to control their location and operation thereon. The city council of Ogden city, by virtue of its general authority over such streets, was authorized to permit street car companies to construct and operate their roads upon them; but without special authority the council could not permit ordinary railroads, with trains propelled by steam power, to do so. The permission is given to facilitate public travel, and for the benefit and convenience of the public. The permission to such companies cannot confer upon them an exclusive right. The right so given exists in common with the right to travel on the streets in wagons and by other vehicles, and on horseback and on foot, in all legitimate ways. Such persons or companies, in the observance of all reasonable care and caution, have the right to pass their cars over their tracks as often as the public convenience requires and the demand will justify. The cars have the right of way, and the travel by other means and in other ways must turn out, because it can and the cars cannot. The city authorities have the right to require the tracks to be so constructed and kept in repair that travel by other modes can conveniently and safely use them. It is the right and duty of the city to exercise such reasonable control over the construction, repair, operation, and business of street railways as the safety, con-

Street rail-
ways gener-
ally.

venience, and good of the public demands. The private rights of the owners and occupants of property abutting on the street must also be protected, for the law is that such abutters have an easement in the street appurtenant to their property of which they cannot be deprived without their consent, or without just compensation in pursuance of the law of eminent domain; and the council has the power, and it is its duty, to say that no more than a reasonable portion of the street shall be occupied by street railways, and it has no right to consent that more shall be so used. In his work on Municipal Corporations, Judge Dillon says: "The author regards the appropriation under legislative authority of a reasonable portion of the street for a horse railway, constructed on the gradual surface of the street, and used under municipal regulation in the ordinary mode, to be such a use as falls within the purposes for which the streets are dedicated or acquired under the power of eminent domain. When thus authorized, and so regulated by the public authorities as not to destroy the ordinary and usual street uses, this is a public use within the fair scope of the intention of the proprietor when he dedicated the street or was paid for property to be used as a street. Such proprietor must be taken to contemplate all improved and more convenient modes of use which are reasonably consistent with the use of the street by ordinary vehicles and in the usual modes. * * * The limitations being that such use must not deprive the abutter of his property rights and easements in the streets, or destroy the ordinary uses of the streets as a public and common highway open to all." If separate tracks for two or more railroad companies on a street with cars operated on them would increase the hazards, or seriously obstruct travel thereon in other ways, or interfere with the right of abutters, such individuals or companies should be limited to the common use of the same track or tracks. This could be done by suitable conditions, reservations, or limitations at the time of the grant of the right of way, or, in the absence of them, in pursuance of the law of eminent domain. Section 3841 of the Compiled Laws of Utah is as follows: "The right of eminent domain may be exercised in behalf of the following public uses: * * *

(3) Wharves, * * * steam and horse railroads. * * *

Sec. 3843. The private property which may be taken under this chapter includes: (1) All real property belonging to any person. (2) Lands belonging to this territory, or to any county, incorporated city, village, or town, not appropriated to some public use. (3) Property appropriated to public use; but such property shall not be taken unless for a more neces-

Right of
eminent
domain.

sary public use than that to which it has already been appropriated. * * * (5) All rights of way for any and all purposes mentioned in section 3841, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof when necessary; but such uses of crossings, intersections, and connections shall be made in manner most compatible with the greatest public benefit and least private injury." Electrical railways were not mentioned in the act, but horse and steam railways were. At that time horse and steam power was used, because thought to be the best. Electricity was not then known as a car motor; but ingenuity and invention have since subjected it to that use, and it is being substituted largely for the others: and we have no hesitation in holding that under the statute the right of eminent domain may be exercised, in proper cases, in behalf of electrical roads as well as for steam and horse railways.

While the owner of a railway may have an interest in its property, that interest is not more inviolable and sacred than other interests in property. The private interest is one thing, and the public use is another. The property is taken for the public use, not to transfer the interest that one person has in the property to another person. Such transfer incidentally and necessarily follows in order that the public benefit may be enjoyed. When the tracks of one company on a street are sufficient for the business of two or more companies they should all be required to use them, and the hazards and inconveniences and obstructions to travel by other modes should be limited to the tracks of the one company. If the interest of each company in the railroad property used in common is sufficient to enable them to accommodate the public travel, that is sufficient. It appears from the allegations of the complaint that the plaintiff had laid down but one track on the streets named, and that the defendants had not commenced the construction of theirs. The court below was asked to declare the ordinance giving the defendants the right of way on them void. If it had been so decreed the defendants could not have laid down one track, and it does not appear that one additional track would have materially obstructed travel by other modes, or that it would have interfered with plaintiff's private easement on the streets appurtenant to its abutting property. The effect of the decree asked by the plaintiff would have been to deny the defendants any permission on the street, even under the

Right to an
injunction.

law of eminent domain; for any rights obtained under that law would not have authorized them to construct their road on the street without the permission of the city council. The allegations of fact are not sufficient to warrant an injunction on the ground that the construction of the defendant's railway would damage the abutting property by materially interfering with rights appurtenant thereto. Except so far as we have considered this case it is analogous to the case of *Henderson v. Ogden City R. Co.*, *ante*, p. 95; (decided at the present term.) The judgment of the court below is affirmed.

ANDERSON and BLACKBURN, JJ., concur.

Electrical Street Railways.—See *ante*, *Halsey v. Rapid Transit Street R. Co.*, p. 76, and note p. 89.

BAUGH *et al.*

v.

TEXAS & NEW ORLEANS R. CO.

(*Texas Supreme Court, February 27, 1891.*)

Railroad in Street—Action for Nuisance—Damages—Depreciation of the Property.—In an action against a railroad company to recover damages for the operation, in a wrongful manner, of its railroad along the street in front of plaintiff's property, there can be no recovery for depreciation of the property caused thereby, the proper measure being such special damages as may accrue up to the time of the trial.

APPEAL from District Court, Harris County.

Stewart & Stewart, for appellants.

W. N. Shaw, for appellee.

GAINES, J.—Appellants brought this suit, as husband and wife, against the appellee, to recover damages, alleging that the husband was the owner of a certain lot in the city of Houston, along the street in front of which the defendant corporation was operating its line of railroad; that the lot was at the time of bringing the suit, and for a long time previous thereto had been their homestead; and that by reason of the raising of the grade of the road in the front of their property, and the unlawful manner of operating the road and the trains, they had been damaged by a depreciation in its value. There were five separate and specific grounds of recovery set up in the petition, to all of which a demurrer was sustained except the first. Upon issues joined upon that ground the parties went to trial, and the defendant had a verdict and judgment in its favor. The rulings of the court in sustaining the demurrers to the second.

third, and fifth grounds of action alleged in the petition are severally assigned as error. The second cause of action alleged is that, by the ordinance of the city of Houston, the defendant company is prohibited from running its trains within the city limits at a greater rate of speed than 6 miles per hour, but that the defendant, since the month of September, 1888, had run its trains along the street in front of plaintiff's property at a rate of speed from 15 to 20 miles per hour; that thereby it was rendered unsafe for the plaintiffs and the other members of their family to cross the track in going to and from their home; and that by reason thereof their property had been rendered inaccessible, and had been depreciated in value in the sum of \$250. The third cause of action alleged was that the city had made it the duty of the defendant to keep flagmen at certain crossings adjacent to plaintiffs' property; that this duty it had failed to perform; and that, by reason of its failure, cars, trains, and locomotives had been permitted to stand on said crossing an unreasonable time, thereby depreciating the value of plaintiffs' property in the sum of \$250. The fifth ground of recovery alleged is that the defendant had caused trains, loaded with cattle, horses, and manure, to stop in front of plaintiffs' homestead "more than five minutes at a time, and often more than a day at a time," and that from the cars so loaded a stench emitted that pervaded the home of plaintiffs, creating great discomfort and sickness to the family, and that as a result their property had been damaged \$500. When a nuisance is created by the construction of works in their nature permanent, and

Damages for
nuisance—
Depreciation
of property
not a meas-
ure.

which, as sometimes occurs in case of works for a public use, are not subject to be abated, the rule is that all damages resulting therefrom to property may be recovered in one action, and the proper measure of damages is the depreciation in the value of the property. *Rosenthal v. Taylor, B. & H. R. Co.* (Tex.), 15 S. W. Rep. 268, (decided at the present term;) *Gainesville, H. & W. R. Co. v. Hall*, 78 Tex. 169, 44 Am. & Eng. R. Cas. 51. That rule also applies when the injury resulting from the nuisance is of a permanent character. But when the nuisances complained of are of a temporary character, such as may be voluntarily removed or avoided by the wrongdoer, or such as the injured party may cause to be abated, only such damages as have accrued up to the institution of the suit or (under our system) to the trial of the action, can be recovered. For such damages depreciation in the value of the property affected by the injury is not a measure, and in such a suit the amount of such depreciation cannot be recovered. In each of the so called "counts" of the

petition the wrongful acts alleged are of a temporary nature, and subject to be discontinued either voluntarily or by suit, and the only damages alleged were the depreciation in the value of plaintiffs' property. To state the case somewhat differently, in those parts of the petition the plaintiff sought to recover for an alleged depreciation in the value of their property caused by the acts of the defendant, and failed to allege facts which would authorize such a recovery. We are of opinion that the demurrers were properly sustained. We would not be understood as holding that the facts alleged in the counts in the petition we had had under consideration show grounds for the recovery of any damages, for we think the allegations in the second and third would not have authorized any recovery whatever. The judgment is affirmed.

FINCH

v.

RIVERSIDE & ARLINGTON R. CO.

(87 California, 597.)

Street Railway—Right of Abutting Owner to Compensation.—The dedication of a street to public use authorizes its use for the tracks of a street railway company, and the owner of the fee is not entitled to compensation therefor.

Location of Street Railway Tracks—Middle of the Street.—A statute requiring street railway tracks to be placed as "nearly as possible in the middle of the street," means that the tracks should be placed "as nearly as practicable" in the middle. The location must be controlled in some degree by the circumstances of the particular case.

Same—Practicality of Placing Tracks in Middle of Street—Evidence.—The evidence in the case held insufficient to support a finding that it was not "practicable" to locate the tracks of a street railway company in the middle of the street.

Franchise of Street Railway Company—Member of City Board a Stockholder.—Where a city board of trustees grants a street railway franchise for the benefit of a corporation to be organized by a number of subscribers, of whom a city trustee, who was on a committee which reported favorable as to the granting of such franchise, was one, and such franchise was subsequently transferred to the corporation, the franchise is void.

COMMISSIONERS' decision. Department 2. Appeal from San Bernardino County.

H. C. Rolfe, for appellant.

W. J. McIntyre, for respondent.

HAYNE, C.—This was an action of ejectment brought by

the owner of the fee of one-half of a street in the city of Riverside called "Cypress Avenue," against a street car company, which was alleged to be using such half of the street in an unauthorized and unlawful manner. The trial court gave judgment for the defendant, and the plaintiff appeals.

There is no dispute about the plaintiff's ownership of the fee of half of the street, nor about the existence of the street, and the consequent right of the public to use it as a highway. The question litigated is whether the defendant's use of it was unauthorized and unlawful. In this regard several points are made.

1. It is contended that the defendant could not use the street for the purposes of its track without first making compensation to the plaintiff, and the case of *Weyl v. Sonoma Val. R. Co.*, 69 Cal. 203, is cited. But that case was not in relation to a street railway, but to an ordinary railroad whose route took it through a street. And we think there is a difference between such a case and the present. The dedication of a street to public use authorizes any ordinary use for street purposes; and the use of a street in a city or town for the tracks of a street car company is of this class, and is therefore authorized.

2. It is argued that the track was not located as required by law. The provision of statute in relation to the subject is that "the city or town authorities, in granting the right of way to street railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with the following conditions: * * * *First*, to construct their track on those portions of the street designated in the ordinance granting the right, which must be as nearly as possible in the middle of the street." Civil Code, § 498. The order granting the franchise did not prescribe the precise part of the street upon which the track was to be located. It was merely that the franchise be granted to the applicants "according to their application;" and, while the application named the streets through which the road was to run, it did not refer to any particular portion of any street. There was, however, a general ordinance, applicable to all street car companies, providing that "the track shall be laid as near the center of the street or streets along the route of the railway as practicable." It will be observed that the effect of this was that the board did not exercise its own judgment as to the portion of the street to be occupied by the track, but left it to the company to construct their track as near the middle of the street "as practicable." The company evidently did not consider it

Compensation to abutter.

Location of tracks.

practicable to place the track in the middle of the street, and accordingly placed it on the side next the plaintiff's lot. The precise location is not shown by the record; but the court finds that "it was not practicable to locate the track in the middle of Cypress avenue." The court further finds that the franchise provided that the track was to be laid "along the eastern side of Cypress avenue," (which, as above shown, it did not provide;) and that "the location of the defendant's track was in conformity with the requirements of said franchise." The plaintiff's position is, in the first place, that the words "as nearly as possible" do not mean "as nearly as practicable," as held by the trial court; and that, even if they do, the finding that it was not practicable to locate the track in the middle of the street is not sustained by the evidence. In relation to the first question we think that the statute means "as nearly as practicable." As a matter of course, it is always physically possible to place a track in the middle of a street. It may not be legally possible. For example, there may already be a track there under a franchise which it is beyond the power of the board to revoke. But even if a track were placed in the middle of the street, under a revocable license, we think that the board would have power to authorize the laying of another track so as not to interfere with the first. So if, as is sometimes the case in rural towns, a row of trees were in the middle of the street, the track could be placed on one side. And we are not prepared to say that the conditions of traffic might not be such as to require a similar location. The use of the words "as nearly," in connection with "as possible," shows that it was foreseen that a location in the middle of the street could not always be made; and we think that, from the nature of the case, the meaning must be that the location must be controlled in some degree by the circumstances of the particular case.

But we do not think that the evidence in the case before us shows any reason why the track could not be located in the middle of the street. Only two witnesses testified on the subject. One of them said, in substance, that it was "impractical" to place such a track in the middle of such a narrow street (it was 40 feet wide), because it would interfere with traffic. To use his own language: "It is impractical to put it in the center of such a narrow street, because it interferes a little bit with the travel, just about the same as when Mr. Finch goes across to his lot 210. It interferes with the travel in passing teams. If the travel is very great, it interferes materially. It depends on how much travel there is." But the witness did not state how much travel there was. The other witness said that a track in the middle of a street

would interfere with traffic "very extensively." But he went on to say: "Putting a street railway in such a street would interfere with the use of the street for other travel wherever you put it. But I should deem it advisable not to put any street railway in the center of such a narrow street, for the reason that it will obstruct the travel to such extent that teams, for instance, cannot pass each other on either side of the track without crossing the track. There would be no room on each side for teams to pass. * * * Of course it is practicable." The effect of this testimony is merely that in the opinion of the witnesses the requirement of the law is wrong, and that it is more convenient to the traveling public to have the track on the side of the street. But the law certainly means more than this. It is an injustice to the property owners on one side of the street to have the obstruction placed close to their doors. And for this, among other reasons, the law requires that it must be placed as near the middle of the street as practicable, and enjoins a "strict compliance" with the requirement.

3. It is contended that the franchise is void because a subscriber to the stock of the company was a member of the board of city trustees, and took an active part in the proceedings in relation to the franchise; and we think that this position must be sustained. It appears that when the application for the franchise was made a number of protests were put in, and the matter was referred to a committee of two, of which E. W. Holmes was one. This committee made a report in writing, recommending that the application be granted. The report was adopted, and the franchise granted at the next meeting. Several months prior to this an agreement to subscribe to the capital stock of a street car company to be formed on lines similar to those of the defendant was gotten up, and by it E. W. Holmes subscribed for 200 shares of stock. A committee of subscribers was appointed to apply for a franchise. The *personnel* of this committee was subsequently changed to some extent. The application was made by the committee, and was granted, on the favorable report of the committee of two, of which Holmes was a member, as above stated. Subsequently the committee made a deed of the franchise to the company. It is true that there was no testimony to show that E. W. Holmes, the city trustee, was the same person as E. W. Holmes, the subscriber. But, in the absence of evidence to the contrary, identity of person will be presumed from identity of name. It is also true that no corporation was formed at the time of the subscription, and that the franchise was granted to several individuals, and not to a com-

Granting of
franchise—
Action of city
trustee.

pany. But, as above shown, the individuals constituted a committee of the subscribers appointed for the purpose of applying for the franchise, and after they obtained it they transferred it to the company formed in pursuance of the subscription. We think that it sufficiently appears that the franchise was granted for the benefit of a corporation to be organized by a number of subscribers, of whom the city trustee was one, and was subsequently transferred to the corporation; and, taking this to be the fact, the case falls within the principle of *San Diego v. San Diego & L. A. R. Co.*, 44 Cal. 106. The trustee was one of a committee of two to whom the application was referred, and the favorable report of this committee, which was adopted by the board, must have influenced its action. In our opinion this vitiated the franchise. For the above reasons we think that the defendant was a mere intruder upon the street, and under the case of *Weyl v. Sonoma Val. R. Co.*, above cited, the plaintiff can maintain ejectment against it. We therefore advise that the order appealed from be reversed, and the cause remanded for a new trial.

We concur:—VANCLIEF, C.: FOOTE, C.

PER CURIAM.—For the reasons given in the foregoing opinion the order appealed from is reversed, and the cause remanded for a new trial.

What Grant of Right to Lay Tracks in Street Carries With it—Use of Street as Depot for Cars.—In *Owensborough & N. R. Co. v. Sutton*, (Ky. Ct. of App., June 25, 1890), 13 S. W. Rep. 1086, it was held that the grant to a railroad company of authority to lay its tracks and switches in a public street, does not carry the right to use such street as a place for making up trains, nor as a depot for cars, nor for receiving and discharging freight. The court said: "The use of a public way may be granted to a railroad company for passage through a city or town, or by switches from its main track to its depot, or receptacle for passengers and freight, because it is in many cases necessary, and may be done without materially injuring the street as a public way. But even a grant for that limited purpose cannot be made, or the right under it exercised, except upon condition of the company being liable for injury done thereby to owners of abutting property; for legislative power does not exist to exempt either an individual or corporation from obligation to so use his or its own as not to hurt others. There is no reason nor necessity in this, or any other case like it, for a railroad company to use a public street as a place for making up its trains, or as a depot for standing cars, or for receiving or discharging freight; for such use necessarily defeats the purpose for which streets are dedicated to the public, prevents reasonable enjoyment by owners of abutting property, and consequently municipal legislature is without power to grant the right. It seems to us appellant does not have the legal right to use Lewis street in the manner complained of by appellee, and such use of it was properly enjoined by the lower court." See generally, *St. Louis, A. & T. H. R. Co. v. City of Belleville* (Ill.), 32 Am. & Eng. R. Cas. 283.

Use of Street by Company in Violation of Contract With Abutting Owners—Right to Injunction.—In *Appeal of Kemble*, (Pennsylvania Sup. Ct., Feb.

16, 1891), 21 Atl. Rep. 225, the owner of property abutting on a street along which the tracks of the railroad company were laid, sued to enjoin the occupation of the street by the company outside of a 20 foot strip in the centre thereof, and for a specific performance of a contract made by the abutting owners with the company which provided that the latter might occupy the centremost 20 feet of the street for their tracks, and that the residue of the street should "remain open for public use as a public highway forever." *Held*, that the suit could not be sustained in the absence of any allegation that the tracks complained of were laid contrary to law, or that the laying of such tracks destroyed the use of the street as a highway, or specially damaged the plaintiff. The court said: "In the first place, there is no such covenant in the agreement as the plaintiff seems to assume to exist; that is to say, there is no covenant that the company would never lay any track upon the fifteen feet on each side of their main track. The covenant is that the said fifteen feet in breadth 'may be and remain open for public use as a public highway forever.' That the fifteen feet referred to are not now, and have not always been, open for public use as a public highway, is not alleged or pretended in the bill. But, even if there had been such a covenant as that which the plaintiff takes for granted, it would be perfectly competent for the legislature to have authorized the railroad company to lay the additional tracks complained of, leaving the plaintiff and all others alleged to be injured to their actions on the covenant or to their claims for damages. Public works authorized by the legislature cannot be arrested or prevented because some one has entered into a covenant that they shall not be built. There is nowhere in the whole scope of this bill any averment that the tracks complained of were laid without authority of law. Such an averment is absolutely essential to the maintenance of such a bill as this, for how can the courts enjoin what the legislature has authorized by a constitutional grant of power? If the company had contracted never to lay any rails upon this fifteen feet, and there had been a breach of the contract, the plaintiff would be put to his action at law upon the broken covenant, but specific performance would not even in that case be compelled, because the contract concerns the public; for the public has an interest paramount to particular individual interests, and their rights cannot be compromised by a personal controversy between the railroad company and an individual. In such cases the proper remedy for the aggrieved party for a broken covenant is an action for damages, not a bill for an injunction; and such an action furnishes a complete and adequate remedy for such an injury. But according to the plaintiff's own showing of the facts it is not true that the tracks complained of were laid in violation of any express covenant of the 'Philadelphia, Germantown and Norristown Railroad Company.' The covenant that the said fifteen feet in breadth shall remain open for public use as a public highway is not shown or charged to have been broken, for it is not averred that it has not been left open for public use as a public highway; and it is clear that the mere laying of tracks there would not destroy the public uses of a highway. Most of our streets are traversed by railways, but no one would have the assurance to say that they are less highways than they were before the tracks were laid. If the defendants have laid tracks upon Ninth street without warrant of law, there are adequate remedies whereby to redress the public wrong; but, if the defendants had legal authority for laying their tracks, (a fact which is nowhere denied in this bill,) they cannot be prevented from using them because they covenanted that Ninth street should remain open as a public highway, especially when it is not charged in the bill, and does not appear that it has not always been open as a public highway. This view of the case relieves us from considering the other manifold defects and uncertainties of the bill complained of by the defendants in the reasons assigned for their demurrers, some of which are of a grave character, as, for example,

that the plaintiff has not set forth in his bill the name of the person from whom his title is derived, or in what manner, and when it was derived. Neither has he averred or shown by which of said companies defendant the tracks were laid, nor that he is specially injured or affected by the laying of such tracks; they being, according to his own showing, more than a square distant from his property. Nor does he set forth through which of the said covenantees he claims, nor aver such facts as are necessary to show that the covenant he sets up is a covenant running with the land which he owns at Ninth and Spring Garden streets. The fundamental defects, however, are that the plaintiff nowhere shows or alleges in his bill that the particular covenant he sets up has been broken, nor that the tracks of which he complains have been laid contrary to law, nor that he has any special damage to complain of. It is ordered that the demurrers of the defendants be sustained, and that the bill be dismissed; the plaintiff to pay the costs."

Authority of Company to Change Track in Street from Narrow to Broad Gauge.—In *Denver, Utah, & P. R. Co. v. Barsaloux*, (Colo., Nov. 7, 1890), 25 Pac. Rep. 165, it was held that a railroad company with a track constructed along a street, will not be enjoined at the suit of abutting owners from changing its track from a narrow to a broad gauge, where there is nothing in the ordinance granting the right of way as to the width of the tracks, even if an injunction could be granted in such a case, a decree prohibiting the broadening of the gauge outside the limits of defendant's property could not stand.

In *Denver, U. & P. R. Co. v. Toohey*, (Colo., Nov. 7, 1890), 25 Pac. Rep. 166, it was held that a landowner cannot maintain an action to enjoin a railroad company from changing its track in a street from a narrow to a broad gauge, where he has for a valuable consideration released such company from all claims for damages by reason of the maintenance of its track in such street.

Right of Railroad Company to Lay Additional Track in Street Without Payment of Additional Damages.—In *Chicago, St. L. & P. R. Co. v. Eisert*, (Ind., Feb. 4, 1891), 26 N. E. Rep. 759, it was held that a city ordinance granting a railroad company a right of way along a street and appropriation proceedings whereby the abutting owners were compensated, gives to a railroad company full authority to use so much of the street as its business requires, and the company has the right to construct one or more tracks in addition to those originally constructed if there is sufficient room to do so. The court said: "The city ordinance did not limit its right to construct but one track, and the damages assessed under the appropriation proceedings covered all damages growing out of the necessary and legitimate use of such portion of such street for railroad purposes, whether it be occupied with one or more tracks." *White v. Chicago, St. L. & P. R. Co.*, 122 Ind. 317, 43 Am. & Eng. R. Cas. 156."

Proximity of Railroad Track to Curbstone—"Line of the Railroad."—In *Chicago, St. L. & P. R. Co. v. Eisert*, (Ind., Feb. 4, 1891), 26 N. E. Rep. 759, it was held that the words "line of the street," in an ordinance granting a railroad company the right to build its road in a street provided "the line of the railroad shall be located so as not to approach the sidewalk curbstone nearer than 15 feet," does not mean the extreme limit including ties and grade, or the centre or thread of the track, but refers to the rails, they being the only part of the road raised above the grade of the street.

Discretion of Street Railway Company as to Laying Tracks in Street.—Where a street railway company has permission by its charter to lay its track in the streets of a city, it may lay the track wherever in its opinion it is for the company's best interest. *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320.

In re PEOPLE'S RAPID TRANSIT CO.*v.*

DASH.

(New York Court of Appeals, December 16, 1890.)

Statute Prohibiting Railroad in Street—Application to Railroad Crossing Street.—A statute (New York Act, 1860), prohibiting the building of any railroad "in, upon, or along any of the streets or avenues of the city of New York," not only prohibits the building of a railroad through the length of a street, but also prohibits the building of a railroad which merely crosses the streets of that city.

Elevated Railroad—Authority to Build Under General Railroad Act.—The New York General Railroad Act of 1850, confers no right upon a company incorporated under it, to build an elevated railroad in the city of New York, passing through the site of solid blocks of buildings, upon which express trains may run at great speed, such road to be constructed in the form of a two story viaduct from fifty to seventy-five feet above the level of the street, each story having two tracks, and consisting mainly of brick arches through the blocks, and crossing the streets by steel bridges.

EARL, J., dissenting.

APPEAL from Supreme Court, General Term, First Department.

Proceeding by the People's Rapid Transit Company to acquire land in the city of New York, under the right of eminent domain, for railroad purposes. From a judgment refusing the petition, petitioner appeals.

Albert Stickney, for appellant.

Geo. A. Strong, for respondent.

PECKHAM, J.—There are two grounds for denying this application.

1. It seems to me plain that the act of 1860 (chapter 10) interposes an insurmountable objection to the granting of it.

Act of 1860
prohibits
crossing of
streets.

It is stated in behalf of the petitioner that there is no intention of building the road through the length of any street, but only across such streets as it will be necessary to cross in its proposed route through the city, from its northern boundary to the City Hall park. The act of 1860 prohibits the building of any railroad "in, upon, or along any of the streets or avenues of the city of New York." It is contended that this act, properly construed, only prohibits the building of a railroad through the length, or a portion of the length, of a street, and does not reach the case of a railroad which merely crosses the

streets of that city. I cannot agree to any such narrowing of what seems to me the plain meaning of the language used in the act. If the road was built through the length of a street, its location might be fairly described by the use of either one of the three words contained in the statute, "in, upon or along" such street. But to describe a road which simply crossed a street as being built "along" such street would be using language neither appropriate nor exact. To say of such a road that it would be "in" or "upon" that street at the point where the road crossed it, would be both appropriate and exact. There is a difference in the meaning of these three words as used in the statute, and some effect should be given to such difference. If their meaning be construed to simply prohibit a railroad along the length of the street, no effect whatever is given to this difference. The words used are certainly apt to describe a railroad which crosses a street. Such a railroad is plainly, for that distance, both "in" and "upon" the street which it crosses. If not "in or upon" it at that point, where is it? No description of its whereabouts at that particular point is better than to say it is "in or upon" the street which it crosses. It is sufficient and it is true. It is not necessary that the railroad should pass along the surface of the street in order to be in or upon it. *In re New York D. R. Co.*, 107 N. Y. 42, 32 Am. & Eng. R. Cas. 202. FINCH, J., in the above case, (page 52,) in alluding to the injury which street railroads might work to the public rights, and to the necessity of guarding and protecting such rights, said: "But street railways may occupy every place in a city, and iron the whole surface, or spin their webs in the air over every avenue, or undermine the entire system of city streets." The proposed railroad in that case was under ground. There is no doubt that a railway under, or elevated above, the surface of a street is still a street railway in that street, and when the road crosses the street, either under or above the surface, it is still "in or upon" such street at the point of crossing. The language of the statute seems so plain and extensive as to furnish a full and conclusive answer to the application of the petitioner. But the researches of counsel have brought to light what is thought to be a legislative interpretation of the meaning of this language, and it is insisted that, whenever the legislature has meant to include the crossing of a street as within its permission or prohibition, it has used such a word as "across," "cross," or "intersect." A careful examination of those statutes reveals, as it seems to me, the fact that those words were generally used with reference to the distinction which the context made between laying a railroad along a highway or canal and across it. No one supposes that there is no differ-

ence between a permission to build a road along a street and a permission to cross it. But I think that, in merely crossing it, the railroad at the place of crossing is "in or upon" the street which it crosses just as much as it is in or upon the street along whose length it is laid.

And, again, it is well known that sometimes more words are used in a statute than are actually necessary to express the meaning of its framers. The fact that the word "across" or "intersect" has been frequently used in former statutes where they intended to permit or prohibit the crossing of a street is not of any great importance in the construction of another statute in which such word is absent, provided the language actually used is sufficient and appropriate to express the idea that the crossing is permitted or prohibited. If the language be broad enough, and there be no other ground for narrowing its actual meaning, it should not be narrowed because in some other statutes additional words have been used to express the same idea. The language of the act of 1860 is as apt and appropriate for the purpose of prohibiting the crossing of a street as it is the traveling through its length, and the abutting owners upon the streets which are crossed would be entitled to receive as much protection by reason of the act as their brethren dwelling in the street along the length of which the track might otherwise run: and, certainly, they are as much entitled to it. Although not so numerous, yet the abutting owners of property on the various streets crossed by a railroad running from Spuyten Duyvil to the city hall in the city of New York would make no contemptible showing in numbers, while the value of the property to be necessarily and immediately affected by the building of the road, it is safe to say, would run up into millions of dollars. No reason can, as it seems to me, be suggested for attempting to narrow by construction and explanation the otherwise plain meaning of this statute. The railroad contemplated is a vast undertaking. Competent engineers estimate its probable cost, including right of way, from Spuyten Duyvil to the park of the city hall (a distance of about 15 miles) at \$86,000,000. It is to pass through great numbers of solid blocks of dwelling-houses and stores, many of them in the heart of the city. A general statute under which a corporation could be formed for building this kind of a railroad would seem to be the most efficient way to secure and conserve all rights. The work of demolition and construction under such peculiar circumstances, and upon so vast and important a scale, should be the subject of great deliberation on the part of the public authorities, so as to furnish the utmost protection and secure the least possible inconvenience to the public and the owners of property ad-

jacent to the contemplated work. The character of such a work, and the manner of its execution, should be provided for and particularly described. The responsibility of the company to the city or the state for the violation of any of its duties in the course of the construction of the road should be clearly defined, and ample guaranties exacted for the meeting of such responsibilities, and for the fulfillment of such duties by the company. It might be that provision should also be made for the payment to the city of a certain proportion of the profits above an amount to be stated. It may be said that the city can provide for all these matters before giving consent to cross the streets. This may be true. Whether such security be sufficient or not is not for this court to say. It is, however, much better that the conditions upon which the work was to proceed should be inserted in a general statute in advance of the organization of a company for the purpose of doing the work as directed by it, rather than that they should be imposed after the company was organized, and had done more or less of the work of construction. It would also prevent the use of any influence to make the condition of consent on the part of the city as purely perfunctory as possible. The conditions to be performed by the company in the case of a general statute would be known in advance, and would be unalterable by the city, and all intending investors in the project would have full knowledge of the same in advance of a subscription. Matters of this nature have been alluded to for the purpose of showing the very great importance of this work, and to give a reason why the meaning of the language of the act should not be unnecessarily narrowed. If the statute of 1860 furnish an answer to this application, the whole subject can be fully and intelligently discussed, and a general act, having all proper safeguards, may be passed which will intrust any city through which a road of the kind herein contemplated is to run with such powers in the matter as ought to be given to a municipality when an undertaking of this magnitude and importance is to be carried on, and where the citizens thereof would be so vitally interested in the work and in the manner of its execution. The amendments to § 28 of the general railroad act of 1850, as contained in chapter 133 of the Laws of 1880, and chapter 724 of the Laws of 1887, do not grant the authority made requisite by the act of 1860, and were never intended for any such purpose. I think the order should be affirmed, because the act of 1860 prohibits the building of such a road.

2. I think there is also another equally fatal objection to this application. It is my belief that the general railroad act of 1850 confers no right upon a company incorporated under

it to build any such structure as the petitioners have here in mind. We have lately held that the act permits the organization of horse railroad companies under its provisions. *In re* Washington St., A. & P. R. Co., 115 N. Y. 442, 40 Am. & Eng. R. Cas. 588. Permission to build and operate railroads, to transport property and persons upon the same by animal power, as well as by steam, or by a combination thereof, had been granted by the legislature many years prior to the passage of the act of 1850, and, when such last named act was passed, the method of propulsion by animal power was familiar to all. The language of the act in subdivision 7 of section 28 specially included the right of corporations formed under it to transport persons and property by the power or force of animals as well as steam. Horse railways were organized under the act almost immediately after its passage, and continuously, without any question of right, for many years. The contemporary and practical construction given to the act by incorporators under it, by the public officials, and by the public itself, was in favor of its application to horse railroads. This court in the case above cited held under these circumstances that it included corporations of that kind; but there is nothing in that case that determines the question now before us. The distance is a long one between a decision that horse railroad companies can be legally organized, and can operate their road under the act of 1850, and one that should hold it proper to organize under that act and build and operate such a road as these petitioners claim the right to build and operate. They seek to build and operate a road in New York city, upon which, as they say, "express trains of the largest passenger capacity may be run at an average speed of fifty miles an hour." The road, as the petitioners also state, is to cross all the streets within the city at an elevation which will not limit, restrict, or in any wise interfere with their present or prospective public use. This is to be accomplished by elevating the tracks above the ground, and passing through the solid blocks of buildings in the city which occupy the proposed site of the road. To do this the property so situated must be taken, and the buildings destroyed. As contained in the moving papers, it is said: "The idea of construction may be described as a 'two-story viaduct,' the first flat having a width of fifty feet, with an elevation of about sixty feet above street level. The second story, with the same axis or center line as the one on which it rests, would be twenty-two feet wide on top, seventy-five feet above the street. The lower viaduct will have a track on each side or edge. The upper one, two tracks side by side. These struct-

ures are to be mainly of brick arches, both in longitudinal and cross sections, the lower one being, as it were, complete in itself before the second tier of arches, forming the second story, is raised upon it. This system applies to all the work through the blocks. The streets will be spanned by steel bridges of the most modern and most approved designs. * * * It is contemplated to have some thirty-one stations between Spuyten Duyvil creek and the Battery. * * * Passengers to be lifted to and lowered from the stations by elevators, of which there are to be four at each station, two on each side of the crossing street, of capacity to give ample room for all comers and goers." It is plain that no such vast viaduct as is above described was ever in the legislative mind when the general railroad act was passed. Nothing of this kind was then known. The idea is comparatively new. The engineer (now deceased) who originated it, or first gave it study and attention enough to come to some practical conclusion regarding such an extraordinary project, felt the necessity on account of its novelty and cost of having other and most prominent as well as competent professional opinion as to its feasibility and capability to perform the service which would be required from a structure like this, prior to placing the plan before the public, or seeking to incorporate a company having for its object the building, equipping, and running of such a road, which is plainly beyond and outside the purview of the act. It cannot be denied that the act was passed for the purpose of effecting the incorporation of the ordinary steam surface or horse railway, and that under it large numbers of both kinds of roads have been incorporated, and now remain corporations. It is true that by its terms it was not to be limited to corporations conveying persons and property by steam or animal power. The words "or by any mechanical power" were added, so that, under the act, corporations might be formed to use any mechanical power for the purpose of transporting persons or property. Under such a provision, it might well be that a company would have the right to organize, for the purpose of using as a means of transporting persons and property, some mechanical power which was not in use, or which was even unknown at the time of the passage of the act. The language used therein would seem to provide for just such a contingency, and to include it within the power given to a company organized under it.

Nor would we say that a railroad company to be properly organized under the act must be wholly confined to a surface road, and not at all to an elevated or an underground structure. Our judgment goes upon the special facts of this case. Here is a scheme which, in its construction and equipment

for actual operation, differs as widely as the poles from the ideas which were in the minds of the legislators of that day, as we are able to gather what those ideas were from the language used, and from our knowledge of the times in which the act was passed.

Same—Idea different from that contemplated by legislature. A great viaduct two stories high, one 60 and the other 75 feet above the level of the ground, built on arches, and going through miles of solid blocks of buildings in a populous city, never, it is safe to say, entered the mind of a single legislator who voted for this act. It was beyond the imagination of any. In carrying out the object of the company,—that is, in operating a railroad in the city of New York,—it is said that it is necessary to do nothing beyond what is plainly authorized by the act. This, however, depends upon the sense in which that language is used. The company proposes to issue stock for the purpose of building a steam railroad. It may borrow money to complete and operate it. It may purchase or take lands for its necessary use, and hire labor and purchase material. All this may be done under the act of 1850, and the object of the company in obtaining and operating a railroad may in that way be attained. This, however, is but a false view of the situation. The question is whether the method of obtaining the completed thing, and the thing itself when completed, is really within the authority of the act. Is this viaduct, 15 miles long, a means or method of obtaining the railroad as a completed thing, such as is contemplated or in any fair way authorized by the act? Or is it a structure clearly beyond the scope and purview of the act, and one which would not have been authorized by it without other provisions relating to the building and operation of a road under such different circumstances from the ordinary surface road? The object and purpose of the general railroad act, were, as it seems to me, to authorize the organization of railroad companies for building, equipping, and operating railroads, having some kind of resemblance to those structures which had already been built, and where the conditions under which the roads should be thereafter constructed and operated would somewhat resemble those already in operation. I do not think the petitioners come within the most liberal construction to be given this act. Their proposed road is shown to be radically different in construction, and in almost every detail, from any which has ever been erected in this quarter of the world, or, until comparatively recently, within the world itself. Its sole resemblance to any railroad ever erected is that the cars are to be run on rails, and are to be propelled by steam.

The manner in which the company propose to build and

operate this road, I have already stated. There can be no doubt that it is not only an extraordinary but a novel method of building an entire railroad. A viaduct 15 miles long through the entire length of a city is not a bridge in any sense of the word. Nothing in the act of 1850 fairly describes or authorizes it. In so stating I do not mean to say that the provisions of a statute can never be construed to include cases or subjects not in existence or known to the framers of the act when it was passed. I am far from holding any such principle; but I think that an act of the legislature passed for a general purpose should not be construed as giving a right to accomplish that purpose by a method or plan which was clearly not within the contemplation of the legislature, and which was unknown to it when the act was passed, and when from the nature of the case and the surrounding facts it is apparent that such method or plan, if known at that time, would not have been permitted without the insertion in the act of other and additional provisions rendered appropriate and necessary in view thereof. It is impossible to believe that the legislature which passed this act, if it had had in mind the building of such a structure through the streets or blocks of a populous city as a method of constructing a railroad, would have permitted it without placing in the act other and greater safeguards to the public interests and the rights of owners of adjacent property than it now contains. The proposed structure is at least as great a departure from the kind of railroad contemplated in the act of 1850 as are the elevated roads in New York city, and yet, if the appellants be right in their contention that their proposed railroad could be built under the authority of the general railroad act, it was wholly unnecessary to have passed the so called "Rapid Transit Act," under which the elevated railroads in New York were organized. The parties had but to organize under the general railroad act, and then proceed under its authority to build their roads. I think, however, it was the general belief that the act in question would not cover or apply to the building of what are known as "elevated railroads" in cities, and that, in order to provide for the organization of companies for that purpose a general act was necessary, granting power to do such work. The same views lead to the necessity of an act of the legislature, general in its nature to be sure, but providing therein for some such kind of structure as is herein contemplated. For these reasons I think the order of the court below, refusing the application of the petitioner, was correct, and it should be affirmed, with costs.

Manner in
which road is
to be built.

RUGER, C. J., and FINCH, GRAY, and O'BRIEN, JJ., concur.

ANDREWS, J., concurs on the second ground of Judge PECKHAM'S opinion, and also on the ground that the obtaining of the consent of a municipality to the construction of a road is a condition precedent to the exercise by the company of the power of eminent domain in the taking of private property therefor.

EARL, J., (*dissenting*).—This is a proceeding by the People's Rapid Transit Company, under the general railroad act of

1850, to acquire the land in the city of New York

of Bowie Dash for the purposes of its railroad.

Case stated. The petition of the company contains all the facts and allegations required by the act, and there is no denial of any of them. It shows that the company was organized under the general railroad act to build and operate a road from Tarrytown, in Westchester county, of and into the city of New York, about 30 miles long; that its purpose is to construct and operate "a railroad of the greatest carrying capacity, to be operated by steam power, upon lands to be purchased or acquired under the provisions of said act of 1850, upon which express trains of the largest passenger capacity may be run at an average speed of fifty miles an hour, which road may be maintained and operated without any injury to any interest of the public, or of the city of New York, and which will withdraw from the ordinary uses of commerce and business the minimum of space and area on the surface of the ground; that such a railroad requires that the curvature of its lines should in no instance exceed five degrees, and that its grade should not exceed one-half of one per cent.; that said railroad will pass above all the streets and highways within the city at an elevation which will not limit, restrict, or in any wise interfere with their present or prospective public use, and as nearly at right angles with such streets as the required curvature of the lines will admit; that, in the few instances, all of which are north of 125th street, where the contour of the surface will not admit of the passage above the street, the tracks will be laid below the street at such a depth as will leave the entire space required for sewers, gas mains, conductors, and all other present or prospective city public uses, wholly undisturbed, and will not in any respect limit, restrict or interfere with such public use; that the line or route so located is not, nor is the railroad or any part of it, within the limits of the city of New York intended to be 'in, upon, or along any or either of the streets, avenues, or highways of said city, nor is the same or any part of it, in fact or intended to be, either 'a street railroad' or a railroad or railway 'over, upon, under, or through' any or either of the streets, roads, avenues, parks, or public places in

said city." The affidavits which accompany the petition show that the company proposes to carry its road except where it is built under ground, upon high brick arches through the city blocks, and over the streets upon high steel bridges. It is entirely clear that the proposed road is not a street railway, nor wholly a surface railway. It is in part an elevated railroad, in part an underground railroad, and in part a surface railroad.

It is contended, on behalf of the landowner, that a company to construct and operate such a road cannot be organized under the general railroad act. That act was not confined in its operation to any particular kind of road. It is very broad and comprehensive in its provisions. Under it, standing alone, any kind of road, —surface, elevated, under-ground, or street,—for the conveyance of passengers and property, can be constructed, and the act contains no limitation as to the motive power to be used. *In re Washington St. A. & P. R. Co.*, 115 N. Y. 442, 40 Am. & Eng. R. Cas. 588. It is not only broad and comprehensive, but also exceedingly liberal. Any number of persons, not less than 25, without any further sanction or authority than that found in the act, can form a corporation to build a railroad anywhere in the state, to be operated in a city or in the country, and they are made the sole judges of the necessity, feasibility, and public utility of the road; and a corporation when thus formed possesses a portion of the sovereign power of the state in its capacity to take by condemnation proceedings the lands of individual owners for its corporate purposes. Among the powers conferred upon such a corporation is one found in section 28 of the act, authorizing it to construct its road "across, along, or upon any stream of water, watercourse, street, highway, plank road, turnpike, or across any of the canals of this state which the route of its road shall interest or touch;" but it is not authorized to construct its road "in, upon or across any street in any city without the assent of the corporation of such city," nor "upon and along any highway without the order of the supreme court." Therefore, under the general railroad act, unless its power is curtailed, or in some way limited by some subsequent act, this company, with the assent of the municipal corporation, can build its road into the city, crossing any of the streets in its route.

The principal contention, however, on the part of the landowner is that the authority given by the general railroad act to construct railroads across streets in the city of New York, with the assent of the city corporation, is taken away by the act (chapter 10, Laws 1860;)

Right to organize under general railroad act.

Effect of act of 1860.

and so it was held in the court below. That act provides that "it shall not be lawful hereafter to lay, construct, or operate any railroad in, upon, or along any or either of the streets or avenues of the city of New York, wherever such railroad may commence or end, except under the authority and subject to the regulations and restrictions which the legislature may hereafter grant and provide;" and it repeals all other acts and parts of acts inconsistent therewith. The question turns upon the scope and meaning of the words "in, upon, or along," the counsel for the landowner contending that they embrace the crossing of a street, while the counsel for the company contends that they only refer to railroads built along and through a street, and we are of that opinion. Such is their natural and ordinary import. According to general usage, and the common understanding of business men, a railroad simply crossing a street would not be considered to be constructed "in, upon, or along" a street. The act of 1860 was manifestly intended substantially as an amendment of the act, chapter 140, Laws 1854. Prior to the latter act there had been no legislation to protect abutting owners against the intrusion of railroads into city streets, except as the construction of such roads was made subject to the assent of the municipalities. It had been found by experience that the municipalities could not be relied upon to give such protection, and hence it was provided in the act that the "common councils of the several cities of this state shall not hereafter permit to be constructed in either of the streets or avenues of said city a railroad for the transportation of passengers, which commences and ends in said city, without the consent thereto of a majority in interest of the owners of property upon the streets in which said railroad is to be constructed, being first had and obtained." The act, by its terms, was confined in its operation exclusively to railroads commencing and ending in the city. Proceedings in the courts of this state, and the history of the times, show that the power conferred upon the common council in the city of New York was improvidently and unwisely exercised, and that the act was easily evaded by commencing a railroad outside the city, and bringing it into the city; and so the act of 1860 was passed to remedy these evils. Both acts obviously dealt with street railroads, as no others were then in contemplation. That the meaning we have attached to the words "in, upon, or along," in the act of 1860, is the legislative sense of them, is made quite apparent by a reference to many legislative acts, authorizing and regulating the construction of railroads in this state. It is believed that these words have never been used in any act so as to embrace the crossing of a street, but

that one of the appropriate words "across," "cross" or "intersect" has always been used in all legislation as to the crossing of streets by railroads.

In the act (chapter 263, Laws 1831) to incorporate the New York & Harlem Railroad Company, it is provided in § 10 that, in case of locating the route of its road "in or along" any public street of the city of New York, it should leave sufficient space in the street on each side of the railroad for a public highway; and in § 11 it is provided that whenever it shall be necessary for the construction of the road to "intersect or cross" any stream of water, watercourse, or any road, street, or highway, it shall be lawful for the corporation, with the consent of the city, to construct its road "across or upon" the same, provided that it shall restore the stream, or watercourse, or road, street, or highway thus "intersected" to its former state, or in a sufficient manner not to have impaired its usefulness. By the act (chapter 300, Laws 1835) "to enlarge the powers of commissioners of highways," it is provided that, whenever any association or individual shall construct a railroad upon land purchased for that purpose on a route which shall "cross" any public highway, it shall be lawful for the commissioners of highways to give a written consent that such railroad may be constructed "across or on" such highway; and thereafter such association or individual shall be authorized to construct and use such railroad "across or on" such highway; but any public highway thus "intersected or crossed" by a railroad shall be so restored to its former state as not to have impaired its usefulness. By the act (chapter 216, Laws 1846) "to authorize the construction of a railroad from New York to Albany" it is provided in § 4 that the company could locate its railroad "on" any of the streets of the city of New York described, with the assent of the city corporation; and in § 14 it is provided that whenever it shall be necessary for the construction of its road to "intersect or cross any stream of water or watercourse, or any road or highway," it shall be lawful for it to construct its road across or upon the same; but the corporation shall restore the stream or watercourse or road or highway thus intersected to its former state, etc. By the act (chapter 140, Laws 1882) it is provided that it shall be lawful for any individual, company, association, or private corporation to build and operate a railroad "on or across" any highway upon certain conditions mentioned.

By chapter 252 of the Laws of 1884, the "Street Surface Railroad Act," it is provided that any company organized under the act may construct and operate a railroad on the surface of the soil, "through, upon, and along" any of the

streets; and these words plainly have reference to railroads laid in and along the streets, and not crossing them, except as the street in which it is laid crosses other streets. Chapter 65 of the Laws of 1886 is an act "to secure adequate compensation for the right to construct, maintain, use, and operate or extend street railroads in cities and villages," and it provides that the local authorities of any incorporated city or village to whom application may be made for consent to the construction and operation of a street railroad "upon, under through, or across any of the streets," etc., must provide for a sale of the right, franchise, and privilege of using the streets at public auction, to the highest bidder as prescribed in the act. Later in the same session of the legislature it was evidently perceived that it would be unjust and impracticable to require the conditions specified from a railroad merely crossing streets, and hence that act was amended by chapter 642 so as to confine its operation to railroads constructed "over, under, upon, or through" any of the streets, etc., the word "across" being dropped. There can be no doubt that the words quoted were intended to describe only railroads built along streets, and not merely crossing them.

But still more significant is the language found in subdivision 5 of § 28 of the general railroad act of 1850. That section first authorizes a railroad company organized under the act to construct its road "across, along, or upon" any street or highway, and "across" any of the canals of the state; and then provides that there shall be no authority for the erection of any bridge or other obstruction "across, in or over" any navigable stream; nor for the construction of any railroad "in, upon, or across" any city streets without the assent of the city corporation, or "upon and along" any highway without the order of the supreme court. Here the words last quoted have reference to railroads built in and along highways, and not to such as merely cross them, and the word "upon" does not embrace such railroads. A railroad in a city cannot be constructed across a city street, without the assent of the city corporation, but it can be constructed across a county highway without the order of the supreme court.

It is not needful, I think, to search further through the statutes of this state for the legislative meaning of the words "in, upon, or along" found in the act of 1860. Neither of them is used in the sense of "across," and, if that had been intended, the appropriate word found in many statutes, and evidently familiar to the legislature in all railroad legislation, would have been used. It was not the purpose of the legislature in the acts of 1854 and 1860, and it was not within the scope of those acts, to regulate the mere crossing of streets

by railroads. The main purpose was the protection of abutting owners. The interests of the city were substantially provided for in other acts. If it was the purpose by the act of 1860 to prohibit the construction of any railroad across any street as well as along any street without further legislative authority, a simple act prohibiting the construction of any railroad in the city of New York, without further legislative authority, would have been much more appropriate, as no railroad can be constructed in New York, which does not cross or pass along some street.

It is further claimed, on the part of the landowner, that the railroad proposed to be constructed is an elevated road, or both elevated and under ground, and hence that the only authority for the construction of such a road is to be found in the act (chapter 606, Laws 1875) generally known as the "Rapid Transit Act."

Rapid transit
act not appli-
cable.

But that act concerns only railroads wholly within one county or one city, and could not be made applicable to a road like this, to be constructed in the two counties of Westchester and New York. It is not needful now to determine the precise scope of that act, as § 40 thereof provides that the act shall not be construed to repeal, or in any manner to affect, chapter 140 of the Laws of 1850, and that none of its provisions shall apply to any railroad company organized under any general or special law of this state for the purpose of constructing or operating a steam railroad upon the surface of the ground. My conclusion, therefore, is that the learned court below fell into error, and I cannot concur with my brethren.

Authority to Construct Elevated Railway under General Railroad Act.—In *Schaper v. Brooklyn & L. I. R. Co.* (New York Ct. of App., Jan. 14, 1891), 26 N. E. Rep. 311, it was held that an elevated railroad was not authorized, under the general railroad act of New York of 1850, and its amendatory and supplementary acts, to build an elevated railway through the streets of a city. The court said: "The decision of this court in *Re Rapid Transit Co. v. Dash*, *supra*, p. 114, requires an affirmance of the judgment. The defendant, intending to construct an elevated railroad along and over certain streets in the city of Brooklyn, commenced the erection of it in part on Boerum place, and in front of property owned by the plaintiff. The plaintiff, insisting that such action was without legal right, brought this suit to restrain the defendant from entering upon and proceeding in the further construction of the railroad in front of his premises. Section 23, tit. 19, chap. 863, Laws 1873, (the charter of the city of Brooklyn,) provides that 'it shall not be lawful hereafter to lay, construct, or operate any railroad in, upon, or along any or either of the streets or avenues of the city of Brooklyn, wherever such railroad may commence or end, unless a majority of the owners of property upon the streets or avenues in or along which such railroad is to be constructed shall first petition the common council of said city therefor, nor unless the said common council shall authorize the construction of such railroad, and the grant therefor shall have been awarded and given to the person who will agree,

with adequate security, to carry passengers on such railroad at the lowest rate of fare.' This section continuing, excepts from its operation various existing and specially named railroad companies, and also 'such other companies as are or may be authorized by law.' No steps were taken by the defendant or the common council of the city in compliance with such provisions. A majority of the owners of property upon the streets or avenues along which it was contemplated to build this road did not petition the common council therefor, and that body did not award a grant of the right to construct to a person agreeing to carry passengers on such road at the lowest rate of fare. But the defendant insisted that, because it was organized under the general railroad act of 1850, and the acts amendatory thereof, and supplementary thereto, the provisions of the charter quoted were not applicable to it; that it was only required to obtain the consent of the common council in the manner provided by that act, which it did. The reasons assigned in support of that position need not be stated or discussed. Since they were presented to us by counsel, the decision cited *supra* has been made. It requires the determination that the general railroad act of 1850, and its amendatory and supplementary acts, did not confer upon a company incorporated under it the right to build within the limits of a city a structure of the character of that contemplated and undertaken by the defendant. The question discussed by the general term need not therefore be considered. The judgment should be affirmed."

Action to Restrain Maintenance of Elevated Railroad—Error in Findings—Modification.—In *Bohlen v. Metropolitan El. R. Co.*, 121 N. Y. 546, which was an action in equity to restrain the defendant from maintaining and operating a railroad in front of plaintiff's property, and to recover the damages sustained, the trial court in formulating its decision in findings of fact stated that the streets along which the railroad was constructed were opened and kept open as streets and highways "in like manner as other public streets and avenues in the said city are, and of right ought to be." Subsequently, he found facts as to the construction, maintenance, and operation of the road, showing it to be an obstruction and appropriation of, and an interference with, the plaintiff's rights, and that they did not constitute a use of the street and avenue consistent with the ordinary street uses thereof. *Held*, that the inconsistency in the findings were of a clerical nature and were properly corrected at a subsequent term by modifying the first finding to correspond to the theory of the judgment.

ABENDROTH

v.

MANHATTAN R. CO. *et al.*

(122 New York, 1.)

Elevated Railroad—Right of Abutting Owner to Compensation.—The erection and operation of an elevated railroad in a street in the city of New York, in the fee of which the abutting owners have no interest, is a material impairment of the abutter's right of property, consisting of easements of light, air, and access, for which he is entitled to recover compensation for the damages inflicted. This is so, although the legislature sanction the use of the street for the purpose of an elevated railroad.

Same—Delay in Bringing Suit for Damages—Acquiescence.—A delay of five years before the abutting owner brought his action for damages, during

which time he was sometimes a fare paying passenger, does not amount to an acquiescence in the construction of the road, which bars his right to recover, where it appears that, at the time the road was constructed, he objected, and threatened litigation.

APPEAL from Superior Court of New York City, General Term.

Action by William P. Abendroth against the New York Elevated Railroad Company and the Manhattan Railway Company for damages caused by the erection of an elevated railroad in front of his premises. A judgment dismissing the complaint on the merits was reversed by the general term, and a new trial granted. Defendant appeals. When the inhabitants of the island of Manhattan were governed by the United Provinces, a public highway was opened pursuant to the laws then and there existing, which way, so far as it appears, had no name, but was a country road, and so remained until the authority of the British government was established on this island. After New York became a British colony, the highway was called "Queen Street," and when it became a state, the way was known as "Pearl Street," by which name it is now designated. In front of the plaintiff's premises the street is 41 feet wide between the house lines; but whether its exterior lines at and near this point coincide with those of Queen street and of the ancient highway does not appear. Since January 2, 1865, the plaintiff has been the owner in fee and in possession of a lot on the south side of this street, which is about 20 feet wide, and about 90 feet deep, on which a four story brick building about 43 feet high, about 20 feet wide, and 60 feet deep, has stood for more than 50 years, and is known as "No. 280." There is no other street or public way by which this lot can be reached. In 1871, the New York Elevated Railroad Company was incorporated under the general railroad law of this state, and in 1875, the Manhattan Railway Company was incorporated pursuant to chapter 606 of the Laws of 1875. During the winter of 1877 and 1878, the first mentioned corporation built an elevated railroad in this street, and in front of the plaintiff's lot, which road, in August, 1878, opened for business and was operated by that corporation until May 20, 1879, since which it has been operated by the Manhattan Elevated Railroad Company under a lease from its owner. The railroad, and its relation to the plaintiff's property, is described in the findings of fact (which description is not questioned) as follows: "Pearl street, in front of plaintiff's said premises, is forty-one feet wide between the house lines, and the sidewalk is from nine feet eight inches to nine feet eleven inches wide. The elevated railroad structure, erected as aforesaid in front of these premises, consisted of

a double row of hollow latticed iron columns set about opposite each other in the edges of the sidewalk, on each side of the street, at intervals along the street of about forty feet, each column being fifteen inches square, standing on an iron plate about eighteen inches square, supported by a foundation of stone, brick, etc., beneath the surface of the ground, about eight feet deep, and six feet square, and said pairs of columns being connected at a height of about sixteen feet above the street with open work iron cross girders; about twenty-two feet six inches long, three feet deep, and one foot wide on top, upon which along the street were placed four open work iron longitudinal girders, about three and one-half feet deep and one foot wide on top, on which were laid, at a height of about twenty-two feet above the street, two railway tracks, consisting of iron rails placed upon wooden ties, or sleepers, said rails being laid in parallel lines about four feet eight and a half inches apart, and said sleepers being about eight feet long, and eight inches wide, and six inches thick, and placed with open intervals from sleeper to sleeper of sixteen inches. The said tracks were laid seven feet three and one-half inches from each other, and just outside each iron rail was placed a wooden guard rail, parallel with the rails, said guard rails being about eight inches high and six inches wide. Between the tracks is a narrow plankwalk way. The said upper structure was made of open iron work with cross braces. The building on plaintiff's said premises was erected upwards of fifty years ago. It is a brick building, four stories high, twenty feet wide, about sixty feet deep, and measuring forty-three feet two inches in height from the sidewalk to the cornice line. The nearest rail of the elevated railroad is ten feet and six inches from the face of said building; the nearest portion of the upper structure of said railroad is about seven feet six inches from the face of said building. The level of the tracks is a little above the second story windows. One of said iron columns stands in the edge of the sidewalk, opposite the westerly wall of plaintiff's said building, so that the westerly line of plaintiff's said premises, prolonged into the street, would intersect the same, and leave about ten inches of the width of said column east of said line; and the space between the south face of said column and the face of plaintiff's said building at the nearest point is eight feet." Neither defendant has acquired, or taken any steps to acquire, by agreement or by condemnation, the right from the plaintiff to build, maintain, or operate the railroad. This action was begun in November, 1883, to restrain the defendants from maintaining or operating the railroad, and to compel them to remove it; and also to recover the damages sustained by the plaintiff by its construc-

tion and operation. The defendants by their answers deny that they have taken or impaired any of the rights of the plaintiff, and allege that he has acquiesced for five years in the construction and operation of the railroad. The trial court found as a fact: "The said railroad structure does not interfere with the air of plaintiff's building, or with access thereto, in any substantial degree." The court also found the following facts: "That said structure is permanent, has and does fill a large portion of the space of said street in front of plaintiff's said premises, and seriously impairs his light; that said engines (those drawing the trains) emit smoke, gas, steam, and cinders, which at times have and do enter the plaintiff's premises through his doors and windows, and causes him injury; that by reason of the facts aforesaid the rental value of the plaintiff's premises has been seriously diminished, * * * and his property has been and is permanently damaged and its value lessened." It is also found as a fact that plaintiff's north line is the south side line of Pearl street.

Julien T. Davies and Edward C. James, for appellants.

Chas. P. & Justus A. B. Cowles, for respondent.

FOLLETT, C. J.—The principal questions involved in this appeal are: (1) Has the plaintiff, by his ownership of a lot abutting on Pearl street, private rights, or rights of property therein? (2) Have the defendants taken or materially impaired those rights, if any the plaintiff has, within the meaning of the constitution? The term "abutting owner" will be used in this judgment to denote a person having land bounded on the side of a public street, and having no title or estate in its bed or soil, and no interests or private rights in the street except such as are incident to lots so situated. The evidence upon which the facts were found not appearing in the record, the findings of the trial court must be accepted as true. In addition to the finding that the plaintiff's lot does not extend beyond the line of the street, it should be noted that there is no finding that the plaintiff, or any one of his predecessors, ever had any title to or estate in the land whereon this street is maintained, or any interest in the street except that of an abutting owner. The view taken of the rights of abutting owners renders it unnecessary to consider the much debated and interesting historical question as to whether the island of Manhattan was, within the law of nations, so discovered, settled, subjugated, or possessed by the United Provinces as to impress upon it and its inhabitants the law of that country, and the general rule of the civil law, that the title to the soil of highways and the beds of public

Questions involved.

Abutter's right to compensation.—Authorities reviewed.

streets is in the government. If the plaintiff, by virtue of being an abutting owner, has not sufficient private rights or interests in this street to have enabled him to have maintained an action for the injuries found to have been inflicted, or for similar injuries inflicted without legislative authority, then he is without remedy in this case. In the cases about to be referred to, the plaintiffs were not all abutting owners, but none of them owned the part of the street whereon the obstruction or encroachment was placed which was the cause of the injury complained of. In *Corning v. Lowerre*, 6 Johns, (N. Y.), Ch. 439, the owner of a lot on Vestry street, was held entitled to maintain an action to restrain the defendant from obstructing the street. In *Van Brunt v. Ahearn*, 13 Hun, (N. Y.), 388, the parties owned lots on Catherine street, in Brooklyn. The defendant obstructed the street at a point some distance from the plaintiff's lot, causing him special damages, and it was held that the plaintiff had such a private right—the right of free ingress and egress—that he could maintain an action to recover his damages and restrain the continuance of the obstruction.

In *Crooke v. Anderson*, 23 Hun (N. Y.), 266, the parties owned lots on Washington avenue, in the city of Brooklyn, and the defendant encroached (not obstructed) on that part of the street which was in front of his lot, so that the street was less convenient for the plaintiff's use in going to and from his lot, thus specially damaging the plaintiff; and it was held that he could maintain an action to abate the encroachment.

In *Fanning v. Osborne*, 34 Hun (N. Y.), 121, affirmed 102 N. Y. 441, 25 Am. & Eng. R. Cas. 252, the plaintiff was an abutting owner on Garden street, in the city of Auburn, and the defendant, without legislative authority, maintained a railroad track in the street, over which cars were drawn by the power of steam. It was held that the plaintiff (he showing that he had sustained special damages) had a sufficient private right in the street to maintain an action to restrain the operation of the railroad. The same doctrine was held in *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 43 Am. & Eng. R. Cas. 219.

In *Callanan v. Gilman*, 107 N. Y. 360, 23 Am. & Eng. Corp. Cas. 59, two abutting owners on Vesey street, in the city of New York, were engaged in business in adjoining stores. It was held that the plaintiff could, by action, restrain the defendant from improperly obstructing the sidewalk by using a temporary bridge, or plankway, by which goods were taken from and into the store, and thus causing a special injury or damage to the plaintiff.

In *Stetson v. Faxon*, 19 Pick. (Mass.), 147, the parties owned

adjoining lots in the city of Boston, which were bounded north by Ann street and south by a street running along the north side of Market square. The city laid out a new street south of the last mentioned one, and sold to the defendant the land between his lot and the new street, which had formed a part of the old street. The defendant erected fences and buildings on the land so purchased, which impaired the value of the plaintiff's property by rendering it less convenient of access, and obscuring the view. In an action to recover damages, it was held that the old street, not having been legally discontinued, the defendant was liable. The principle running through these cases has been maintained in England for at least 200 years. *Maynell v. Saltmarsh*, 1 Keb. 847; *Fritz v. Hobson*, 14 Ch. Div. 542. The same rule has been held applicable to country highways, (*Pierce v. Dart*, 7 Cow. (N. Y.), 609; *Hood v. Smith*, 5 Wkly. Dig. (N. Y.) 117;) and has received the sanction of the courts of most of the states of the Union. Ang. & D. Highw. § 285. These cases do not rest on the fact that the wrongs happen to amount to public nuisances; for no person can maintain a private action for the recovery of damages against the creator or maintainer of a public nuisance unless it occasions him special damages by an immediate injury to his person or property, or by a consequential injury to his property. *Lansing v. Smith*, 8 Cow. (N. Y.), 146, affirmed 4 Wend. (N. Y.), 10; *Wood*, Nuis. § 655. All of these cases were for the recovery of consequential damages to real property bounded by the side or center of the street, or for the recovery of such damages sustained by occupants of such property, and in none of the cases were the obstructions or encroachments on or opposite to the property of the plaintiff. There are important differences between the case at bar and those cited. In the cases referred to, the acts which were held to be actionable wholly or partly obstructed the streets, and rendered the property of the plaintiffs less accessible, and none of them were done pursuant to legislative authority; while in the case at bar, the acts complained of were done pursuant to such authority, and do not, as found by the court, impair, in any substantial degree, the accessibility of the plaintiff's premises. But these cases do establish the principle that the owner of a lot on a public street, whether it extends across, to the center, or only to the side of the street, has incorporeal private rights therein which are incident to his property which may be so impaired as to entitle him to damages. If this be not so, it is difficult to see how he can maintain any action except such as can be maintained by a stranger for an immediate injury to person or property caused by an obstruction while lawfully travel-

ing in the street. The judgments in *Story v. New York El. R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, and *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, seem to compel this conclusion. In *Story's Case* importance was given to the language of a covenant contained in the grants dividing and conveying the lots forming a larger tract owned and granted by the city, (of which *Story's* lot was a part,) and to chapter 86 of the Revised Laws of 1813, under which the street was laid out. But the judgment in *Lahr's Case* was not placed on the ground that any rights in or to the bed of the street had been granted or reserved to him, or to any of his predecessors, and it was held, some force being given to the act of 1813, that he had rights of property in the street. The learned judges who delivered dissenting opinions in *Story's Case* did not deny, but rather assumed, that the abutting owner had rights of property in the street, and held that those of the public were paramount; that the rights of both arose and existed by virtue of the same authority; and that those of the abutting owner could, by legislative and municipal action, be further subordinated to the rights of the public for the purpose of affording additional and necessary facilities for the transportation of persons and property through the street. Since *Story's Case* was decided, questions akin to the one under consideration have been discussed by the court of appeals. In *Mahady's Case*, 91 N. Y. 153, 14 Am. & Eng. R. Cas. 142, *ANDREWS, J.*, in delivering the opinion of the court, said: "The plaintiff, though an abutting owner simply, the fee of the street being in the city, was entitled to the use of the street, and neither the legislature nor the city could devote it to purposes inconsistent with street uses, without compensation, according to the principle of *Story v. New York El. R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596." Again, the same learned judge, in delivering the opinion in *Pond's Case*, 112 N. Y. 188, said: "The *Story Case*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, established the principle that an abutting owner on streets in the city of New York possesses, as incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of his abutting lands, and that the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation."

In *Powers v. Manhattan R. Co.*, 120 N. Y. 178, *BROWN, J.*, in his opinion, said: "The facts of the *Story Case* were not broad enough to necessarily cover the case of an abutting owner, whose only property in the street was an easement

for light, air, and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. Metropolitan El. R. Co.*" The case last cited did not, perhaps, involve the question discussed in the remarks quoted, but it cannot be assumed that they were made without deliberation: for since *Story's Case* this precise question has been much debated, and hardly out of the minds of the judges of the court of last resort.

The judgments for damages which have been recovered and sustained against the elevated roads do not, and cannot, rest on the ground that the roads are public nuisances, for they were constructed pursuant to statutes; and besides, as before stated, a public nuisance does not create a private cause of action unless a private right exists and is specially injured by it. The only remaining ground upon which they can and do stand is that by the common law the plaintiffs had private rights in the streets before the roads were built or authorized to be built. It is clear we think that these rights were not created by the statutes under which the corporations were organized, nor by the construction of the roads, nor do they exist by force of the judgment in *Story's Case*; but they existed anterior to the construction of the roads, and have simply been defined and protected by the decisions made in the litigations against these corporations.

It being established that an abutting owner has property rights in the street, and that an action could have been maintained against the defendants for the recovery of the damages caused by their acts, had they been done without legislative authority, it becomes material to inquire whether such right of action is cut off because the road was constructed pursuant to such authority. The constitution of this state provides: "Nor shall private property be taken for public use without just compensation." Article 1, § 6. It is settled by *Story's Case* and *Lahr's Case* that such rights as this plaintiff has in Pearl street "are private property," within the meaning of the constitutional provision quoted; and these cases also hold that by the construction and operation of an elevated road in the street in front of an owner's premises his rights are "taken for public use," within the meaning of the constitution. *Forbes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 43 Am. & Eng. R. Cas. 137, does not decide that an abutting owner has not vested rights to light, air, and access in a public street, which are incident to his lot, and which are private property, within the meaning of the constitution, but that the operation, pursuant to legislative authority, by the defendant of its steam railroad on the grade of the street, which was at

Effect of legislative authority.

about the natural surface of the ground, was not an actionable invasion of the abutter's right. The learned judge who wrote the opinion in that case thus defined the limits of the question to be discussed: "It (defendant) admits that plaintiff had an easement in that street, but it denies that it has occupied or appropriated it. Whether it has taken any portion of the plaintiff's easement in the street in question is what the defendant asks shall be decided by us, and it denies *in toto* any taking whatever of the plaintiff's property, or any portion thereof." The conclusion which we arrive at is that the erection and operation of the elevated road in Pearl street immediately in front of the plaintiff's premises, in the manner and with the effect described in the findings of fact, was material impairment of the plaintiff's right of property, for which he is entitled to recover compensation, for the damages inflicted.

It is urged that if the plaintiff ever had a right of action it has been lost by his acquiescence in the construction and use of the road by the defendant. It is found that **Plaintiff's acquiescence in construction.** when the road was being built through this street the plaintiff forbade the New York Elevated Railroad Company to construct it, and threatened that corporation with litigation, but began no action until this suit was commenced; and in the meantime he has occasionally been a fare paying passenger on the road. Had this action been brought in equity solely for the purpose of compelling the defendants to remove their structure, and if all persons having such interests in the elevated road as would entitle them to be heard before such relief could be granted, were parties to the action, personally, or representatively, this question might require some consideration; but in an action for the recovery of damages, the conduct of the plaintiff, as found by the court, and his delay in bringing the action, is not a defense. The order should be affirmed, and judgment absolute rendered against the appellants, with costs. All concur, except HAIGHT, J., absent.

Elevated Railroad in Street—Abutter's Right to Compensation.—See Story v. New York El. R. Co. (N. Y.), 7 Am. & Eng. R. Cas. 596; note 36 *Id.* p. 18; Sullivan v. North Hudson County R. Co. (N. J.), 40 *Id.* 324; Drueker v. Manhattan R. Co. (N. Y.), 30 *Id.* 418; Fifth Nat'l Bank v. New York El. R. Co. (C. C.), 22 *Id.* 146; New York El. R. Co. v. Fifth Nat'l Bank (U. S.), 43 *Id.* 403; Tallman v. Metropolitan El. R. Co. (N. Y.), 43 *Id.* 409; Newman v. Metropolitan El. R. Co. (N. Y.), 43 *Id.* 412, note 418.

Same—Punitive Damages Based on Failure to Institute Condemnation Proceedings.—In Powers v. Manhattan R. Co., 120 N. Y. 178, it was held that the failure of an elevated railroad company to institute condemnation proceedings along its whole line within two years after the courts had finally decided that abutting owners were entitled to compensation, is not

of itself, such a wanton and oppressive act as to entitle such abutting owners to punitive damages. The court said: "The purpose of awarding such damages is to punish a wrongdoer, and unless a wrong motive exists there is no basis for such award. The elevated road through Division street, in front of plaintiff's property, was constructed in 1879, and trains commenced to run March 1, 1880. It was leased to the defendant by the Metropolitan Railway Company, May 1, 1879. The road was constructed under legislative authority, and the statutes authorizing the creation of elevated railway companies were declared constitutional. *In re Gilbert El. R. Co.*, 70 N. Y. 361; *In re New York El. R. Co.* *Id.* 327. Whether or not an owner of property abutting on the streets in which the elevated roads were constructed was entitled to damages caused by the construction and operation of the road was a question upon which there was a wide difference of opinion among lawyers and judges, and was not settled until the decision of this court in the case of *Story v. New York El. R. Co.*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, (in October, 1882.) It had been decided adversely to the property owner by the lower courts, and the Story Case was twice argued in this court, and from the decision finally made three members of the court dissented. The facts of the Story Case were not broad enough to necessarily cover the case of an abutting owner, whose only property in the street was an easement for light air and access, and hence the right of such owners to maintain actions for damages was not finally set at rest until the decision in *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, (in February, 1887.) This action was commenced in August, 1884. In view of these facts thus briefly referred to, and which now form one of the most important and interesting chapters in the history of litigation in this state, it is impossible to find a wrong motive in the entry of the defendant or its predecessor, the Metropolitan Railway Company, upon the street in front of plaintiff's property. It had legislative and judicial authority to support its acts; and, assuming that plaintiff owned the fee in the bed of the street in front of his property, we do not think that a failure to institute condemnation proceedings within the two years following the decisions of the Story Case, along the whole line of its railway through the city, could be held to be of itself such a wanton and oppressive act as to justify an award of punitive damages."

KANE *v.* METROPOLITAN ELEVATED R. CO. *et al.*

DUYCKINK *v.* NEW YORK ELEVATED R. CO. *et al.*

(*New York Court of Appeals, January 13, 1891.*)

Title to Streets of New York City—Trust for Benefit of Public—Rights of Abutters.—By the Dongan charter of the city of New York of 1686, and by the New York Act of 1813, vesting in the city of New York title to all its streets, there is an express legislative declaration of a trust in respect to all such streets, however acquired, that they shall forever be kept open as public streets, upon the faith of which, owners of abutting property are presumed to have acted. The legislature cannot abrogate this trust, or authorize its violation, without making compensation for any injury sustained by abutting owners. The fact that the street in question was opened by the Dutch, does not render applicable thereto the rule of the civil law, which vests the fee of all streets in the sovereign, to the exclusion of any private rights or easements in abutting owners.

Elevated Railroad—Abutter's Right to Compensation.—Since there has been a dedication of such streets, not only of a right of passage thereover to the general public, but also, of the easements of light, air, and access,

to the abutting owners, such easements cannot be impaired by the construction, under legislative sanction, of an elevated railroad in the street, without compensation to such abutting owners.

Title to Street in Private Person—Effect on Abutter's Right to Damages.—The abutting owner's right to compensation, arising from the construction of such elevated road, is not affected by the fact that the title to the street is nominally in individual owners of lots on the opposite side of the street, where it appears that such abutting owner has acquired a prescriptive right against such individual owners, and it does not appear that the railroad company claims under them.

Damages for Consequential Injuries—Noise of Trains.—The occupation of the railroad company being unauthorized, constituting it a trespasser, the abutting owner is entitled to recover compensation for the consequential injuries flowing from the operation of the road, such as the noise of trains. EARL, J., dissenting.

Evidence as to Diminution of Rental Value of Buildings not on Line of Road.—The court rejected evidence as to the diminution of rental value of other buildings near to that of the plaintiff, but not on the line of defendant's road. *Held*, that while such ruling was technically erroneous, it is not a ground for reversal, since in the early part of the trial the parties consented to a rule excluding evidence of that character.

APPEAL from Common Pleas of New York City and County, General Term.

John F. Dillon, for appellants.

G. Willett Van Nest, for respondent.

ANDREWS, J.—The plaintiff is the owner of a lot on the easterly side of Pearl street, in the city of New York, which on the 1st day of December, 1768, was granted by the mayor, aldermen, and commonalty of the city to the plaintiff's predecessor in title, by a description which bounded the westerly side of the lot on Queen (now Pearl) street. When the grant was made, the tidal waters of the East river washed the easterly side of the street which was coincident with the water line; and the lot granted was then under water. It was subsequently filled in and reclaimed, and has been built upon, and Pearl street has become one of the important business streets of the city of New York. The road of the defendant has been constructed in front of plaintiff's lot, and this action is brought for damages thereto caused by its construction and operation.

Few questions have come before the courts in this generation of greater practical importance, or involving larger pecuniary interests, than those growing out of the construction of railways in city streets. Whether such streets may, under legislative and municipal authority, be occupied by railroad tracks, to the inconvenience of abutting owners, without making compensation, and what limitation, if any, there is to the legislative power over streets, which cannot be trans-

Railroads in
streets—
Abutter's
rights gener-
ally.

gressed without violating the legal and constitutional rights of lotowners, are questions which have excited the gravest debate, and have been the subject of the most careful judicial consideration. Under the decisions made, there seems to be no longer any doubt in this state that streets in a city, laid out and opened under charter provisions may, under legislative and municipal authority, be used for any public use consistent with their preservation as public streets, and this although the use may be new, and may seem to impose an additional burden, and may subject lotowners to injury. The mere disturbance of their rights of light and access, by the imposition of a new street use, must be borne, and gives no right of action. It is also the law of this state that the use of a city street for an ordinary horse or steam railway, unless it practically closes the street, is a street use, which may be permitted, and that abutting owners, whose lots are bounded by the side of the street, have no legal redress in the absence of negligence in the construction or operation of the railroad, although it interferes with the enjoyment of their premises, or seriously impairs their value. *Forbes v. Rome, W. & O. R. Co.*, 121 N. Y. 505, 43 Am. & Eng. R. Cas. 137.

In the *Story Case*, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, three principal questions were considered: (1) Whether the appropriation of Front street for the use of the elevated railroad was consistent with the use of the street as an open public street; (2) whether *Story*, an abutting owner on the street, the fee of which was (as was assumed) in the city, had any property rights, in the nature of easements of light, air, and access, in and from the street, for the benefit of his adjacent property, which were invaded by the construction of the road; (3) whether such rights, if they existed, were property, within the constitutional provision prohibiting the taking of private property for public use without due compensation. The decision of the court on the first point, while recognizing the rule that the legislature may authorize the construction and operation of an ordinary surface railroad in a city street, placed its decision against the defendant on the character of the structure, and held that it was destructive of the street uses for which streets are established. Upon the second point, it was held that the plaintiff had easements in the street of light, air, and access, appurtenant to his lot, which were affected by the structure of the defendant, impairing the value of his lot. The court, in tracing the origin of his property rights in the nature of easements in the street, placed much stress upon two facts, viz.: The original grant from the city, then the owner both of the land granted and of that which subsequently became Front street, describing the

*Story and
Lahr cases.*

lot granted by reference to a survey and map on which Front street was delineated; and, *second*, the express covenant of the city, contained in the grant, that the streets referred to therein should forever thereafter continue to be public streets. It was decided, in respect to the *third* point, that incorporeal rights annexed to property were property, within the protection of the constitution, and could not be taken or impaired without compensation.

In the Lahr Case, 104 N. Y. 268, the street upon which the plaintiff's lot was situated had been opened under the statute of 1813. The decision in the Story Case left open but one point for discussion, viz., whether lotowners upon streets opened under that statute had similar easement of light, air, and access as those which Story had, although the plaintiff, and those under whom he claimed, did not derive their title from the city, and had no express covenants such as existed in the Case of Story. The court decided that the plaintiff, notwithstanding this difference in the circumstances in the two cases, had easements of the same character as Story. The court regarded the statute of 1813, which permitted the taking by the city of lands for streets and the assessing of the cost of improvement upon the property benefited, taken in connection with the trust declared therein, as equivalent to a contract or covenant by the city with the adjacent lotowners that the streets opened under the statute should forever remain open and public streets, and the consequence was held to follow that they could not be appropriated to other than street uses, to the injury of abutting owners, except upon the condition of making compensation.

The present case presents still another phase of the general question. Pearl street, on which the plaintiff's lot is situated, was a street prior to 1664, and was opened under the Dutch *regime* during the Dutch occupation of Manhattan island. It passed, with all the other territory occupied by the Dutch, under the control of the crown of Great Britain, upon the capitulation in 1664. There is no evidence in the case of the circumstances attending the opening of Pearl street, or whether the soil forming the bed of the street was, when it was laid out, private or public property. The contention of the defendant upon this state of facts, in brief, is that under the civil law, which was the law of Holland, the sovereign was vested with the absolute title to the soil of all streets and highways within his dominions, and that no private rights or easements existed therein, and that an owner of land adjacent to a street acquired no rights by reason of adjacency, or from the fact that he had built upon the street in reliance upon its continued

Effect of
street having
been opened
by Dutch.

existence, to have it kept open as a street or way, but that it was competent for the sovereign to close the street, or to convert it to any different public use at any time, without making any compensation to owners of adjacent lands, although by so doing the value of their property might be diminished, or even substantially destroyed. The argument following from this premise is that the English crown succeeded to the rights and power of the states general as to all streets laid out under the Dutch occupation, and that, whatever rule may prevail as to streets in the city of New York laid out since 1664, the owners of lands abutting on Pearl street have no private rights whatever in the street, and that the legislature has absolute and uncontrollable power to close such street, or to convert it to any use, however inconsistent with its use as a street, and that abutting owners would have no remedy whatever.

In the very learned and able brief of the counsel for the defendants many authorities are cited, and quotations made from the writings of the civilians, in support of their statement of the rule of the civil law. But assuming the powers of the sovereign under the civil law to be as broad as claimed, and that the English crown succeeded to the same powers as to streets in the city of New York opened prior to 1664 as existed in the sovereign under the civil law, it still remains to be considered whether these powers have since been modified as to these ancient streets, by grant or covenant, or legislation, or otherwise, so as to vest in abutting owners rights in such streets, in the nature of easements, which before they could not have claimed. In this case the only open question is whether the plaintiff, as abutting owner, has the right to have Pearl street kept open as a public street, and to the advantages of light, air, and access in and from the same, for the benefit of his abutting property, and whether it is distinguishable in principle from the cases heretofore decided. By the Dongan charter, the colonial government granted to the mayor, aldermen, and commonalty of the city of New York all the streets in the city for public use. This was in 1686, nearly a century before the grant by the city to the plaintiff's predecessor in title of the lot now owned by him. In its grant the city bounded the lot on Pearl street. The city was then the owner both of the soil of the street and of the land granted. If it was necessary to decide the question, it would be worthy of serious consideration whether, under these circumstances, there was not a grant by implication, by the city to its grantee, of a right to have Pearl street kept open as a public street for the benefit of the lot granted, within the principle of many of

The charters
of New York
imposing
trust on
streets.

the cases referred to in the Story Case, that where an owner of land conveys a lot, bounding it on a street laid out by him on his own land, he thereby establishes it as a way for the benefit of his grantee and his successors in title, which the grantor cannot thereafter close or obstruct to their prejudice. But, as we place our decision on a broader ground than is suggested by these special circumstances, we pass the point without consideration, and shall assume that no covenant was implied, in respect of Pearl street, in the grant by the city of the lot in question. The main argument pressed upon our attention, in opposition to the claim that the plaintiff has an easement or property right in Pearl street by virtue of his being an abutting owner merely, is founded on the principle of the common law, that an easement in another's land must have its origin in grant or in prescription, which presupposes a grant, and upon the fact that not only is there no evidence of such a grant in this case, but that, it having been shown that the street was opened by the Dutch and presumably governed by the rules of the civil law, the existence of any private right or easement in the street in favor of abutting owners is conclusively disproved.

It is undoubtedly true that there is inseparably associated with the idea of a common-law easement the existence of a grant whereby one tenement is subjected to a burden or servitude for the benefit of another, and it must be admitted (upon the assumption we have made as to the construction of the grant of 1768) that the plaintiff's case is destitute of any proof that the easements or rights which he seeks to enforce originated in grant or in any covenant which operated as a grant between himself or his predecessors in title and the city of New York. The defendant is also entitled to the further admission that, if the rights asserted by the plaintiff in Pearl street could only be created in the mode prescribed by the common law for the creation of easements in land, the plaintiff must fail in his action. But, however difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in the municipality, has, by virtue of his proximity, special and peculiar rights, facilities, and franchises in the street, not common to the citizens at large in the nature of easements therein, constituting property of which he cannot be deprived by the legislature or municipality, or by both combined, without compensation. *Crawford v. Village of Delaware*, 7 Ohio St. 460; *Cincinnati & S. G. Av. St. R. Co. v. Comminsville*, 14 Ohio St. 524; *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.), 668; *Lackland v. North Missouri*

R. Co., 31 Mo. 180; Railroad Co. v. Steiner, 44 Ga. 546; Central Branch U. P. R. Co. v. Twine, 23 Kan. 585; Central Branch U. P. R. Co. v. Andrews, 30 Kan. 590, 14 Am. & Eng. R. Cas. 248; Theobald v. Louisville, N. O. & T. R. Co., 66 Miss. 279, 38 Am. & Eng. R. Cas. 462; Burlington & M. R. Co. v. Reinhackle, 15 Neb. 279, 14 Am. & Eng. R. Cas. 169; Haynes v. Thomas, 7 Ind. 38; Town of Rensselaer v. Leopold, 106 Ind. 29.

In several of the cases just cited it was held that the laying of a railroad track in a town or city street, and the operation thereon of a steam railroad, was inconsistent with the uses for which streets are established, and in this respect the decisions are more favorable to the abutting owners than those in this state; but this does not weaken their force as an adjudication of the principle that abutting owners have as such a property right in the street in front of their premises, which entitles them to restrain its appropriation to other and inconsistent uses. The opposite view has been maintained in Pennsylvania. The courts of that state have strenuously asserted the supreme power of the legislature to appropriate streets to public uses destructive of their ordinary use as public ways, and have denied the right of abutting owners to compensation, however serious the injury to their property occasioned by such appropriation. The injustice of this rule led to the insertion in the new constitution of Pennsylvania, adopted in 1874, of a provision declaring that municipal and other corporations, invested with the privilege of taking private property for public use, should make compensation for property "taken, injured, or destroyed," by the construction of their works, etc. Subsequently, in the case of Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352, 29 Am. & Eng. R. Cas. 354, the court sustained, under this constitutional provision, an action in favor of an abutting owner on Filbert street, in the city of Philadelphia, for damages to his premises, caused by the construction by the defendant of an elevated track for its road, in the street in front of his premises, which obstructed access thereto, and impaired the value of his property. The Story Case decided that Story was entitled to relief against a similar structure, on the ground that the injury complained of by him was a taking of his property under the provisions of our state constitution in reference to the taking of private property for public use, which does not contain the words "injured or destroyed," as does the similar provision in the Pennsylvania constitution of 1874. The city of New York has a proprietary interest in the streets of that city. It owns the fee of the land occupied by the streets, whether such streets were laid out under the Dutch *regime*, or during the colonial

Railroad in street inconsistent with its use.

period, or subsequently, after the organization of the state government. But its tenure is in trust for street uses, declared or recognized in the original charters and in the state statutes. The Dongan charter expressly vested the title to the streets in the mayor, aldermen, and commonalty of the city, and the trust was declared in the following words: "For the public use and service of the mayor, aldermen, and commonalty of the said city, and of the inhabitants of Manhattan's island, and travellers therein." The Dutch streets, as well as all other streets in the city then existing, were included in this grant, and were all impressed with, and were to be held under, the trust so declared. Under the act of 1813, the title to streets laid out and opened under that act also vested in the city, but the statute declared the trust: "In trust, nevertheless, that the same be appropriated and kept open for or as a part of a public street, avenue, square, or place, forever, in like manner as the other public streets, avenues, squares, and places in the city are and of right ought to be." This statute was in precise harmony with the policy indicated by the Dongan charter, to vest the proprietary interest in the streets in this corporation, as the donee of a trust for those for whose benefit it was created. The legislature, by the acts of 1779 and 1793, (1 Greenl. Comp. 31; 3 Greenl. Comp. 54,) confirmed and emphasized this policy by a formal investiture of the city with all the rights of the state, if any, in the public streets.

It is to be observed that the declaration of trust in the act of 1813 expressly recognized that all of the streets of the city then existing were held under the same trust as was declared in respect of the streets to be laid out under that act. The words are, "in like manner as the other streets," etc., "in the said city are and of right ought to be." If the trust declared as to streets to be opened under that act was in legal construction any broader than the trust declared in the Dongan charter, then manifestly there was an express legislative declaration in the act of 1813, that the city thereafter was to hold the streets in existence when that act was passed upon the same trust and tenure as the new streets to be opened thereunder. The question then arises, for whose benefit was this trust created? There can be no doubt, of course, that the public at large were beneficiaries. The streets were to be kept open as public streets forever, and it has always been recognized as one of the primary duties and functions of the state to open and maintain streets and ways as channels for transit, traffic, and commerce. But streets, as is well understood, especially in centres of population, subserve the interests of the state in

Effect of legislative declaration of trust.

other ways than by affording passage to the public from one point to another. They afford opportunities for erecting wharves and warehouses, stores and dwellings, and public buildings, by public and private enterprise, which contribute to the convenience of the public, and enhance the wealth and prosperity of the state. They encourage the improvement of private property located upon the streets, and, as is well known, real property in cities derives its chief value from such location. We think it would be limiting the scope of the trust declared in the charter and statutes, to which we have referred, quite unwarrantably, to confine it to the aggregate public, and deny its application for the special benefit and protection of property abutting on the streets. This question was referred to by Judge TRACY in his opinion in the Story Case. He says, (page 176 ;) " That the trust created by the act of 1813 was intended to be for the benefit of the abutting owner as well as for the public we cannot doubt;" and we concur in this view. We have, then, an express and deliberate legislative declaration of a trust in respect to all the streets owned by the city, however or whenever acquired, that they shall forever be kept open as public streets, upon faith of which owners of abutting property have or are presumed to have acted in improving and building thereon. Can the legislature abrogate this trust, or authorize its violation, without making compensation for any injury sustained by abutting owners? Justice requires a negative answer, and we think it may be properly said that the acceptance and acting upon this trust by owners of abutting property creates in them a right, which the law will enforce, to have and enjoy the advantages and incidents of a public street, in connection with their property, of which the legislature cannot deprive them without compensation. The statutes for laying out streets proceed on the theory that special advantages are thereby conferred upon, and will be enjoyed by, the owners of abutting property. In 1793 the legislature, by chapter 42 of the Laws of that year, authorized the widening of John street, and directed that the expense should be apportioned by commissioners, who should determine the part to be borne by the city, and the part which ought to be borne " by individual citizens whose estates in the said street and vicinity will become advanced and increased in value by such improvements." In 1784 the legislature provided for the alteration of certain streets in the city, and provided for damages to individuals whose property should be injured by such alteration. Chapter 56. The system of maintaining, paving, and repairing streets, and assessing the expense on the adjacent property, recognizes the existence in abutting owners

of a special and peculiar interest in the streets, other than that of the public at large. The defendant's counsel in support of the claim that the legislature may deprive abutting owners of the use of the streets in front of their premises, or convert them to other and inconsistent uses, urge the analogy of cases which have arisen in respect of the rights of riparian owners on navigable waters, by which, as they allege, it is settled that one whose grant is bounded by high water mark of a navigable stream may, under legislative authority, be cut off from access to the water, without receiving any compensation. The cases of *Gould v. Hudson River R. Co.*, 6 N. Y. 522, and *Lansing v. Smith*, 8 Cow. (N. Y.), 146, 4 Wend. (N. Y.), 9, are cited in support of the proposition. It is sufficient to say, in respect to the case of *Gould v. Hudson River R. Co.*, that it has been frequently criticised, and cannot be regarded as a decisive authority upon the point adjudged therein. The case of *Lansing v. Smith* was the case of a public improvement to promote the navigation of the Hudson river, and afford greater facilities for commerce. The improvement was consistent with the use of the river as a highway. In the regulation of this public right the use of the plaintiff's dock was rendered less convenient, but was not prevented. The court held that the act was constitutional. But the chancellor, in his opinion, expressly reserved the question whether the legislature could grant a right to build a wharf in front of the plaintiff's so as to destroy it entirely, saying, "That is a question which it is not necessary now to discuss."

The main question presented on this appeal is difficult of solution. There must be a property right in the street to authorize the maintenance of the action. The plaintiff's easements, or rights in the nature of easements, are not created by grant or covenant. They arise, we think, from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges, and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be diverted to other and inconsistent uses. There is some analogy, we think, between the rights of abutting owners as against the public, and those acquired by the public against private persons, in streets or highways by dedication. The public acquires, upon acceptance of a dedication by the owner of land of a highway over the same, a perpetual easement therein for a highway, although there may be no deed or writing or covenant, and no formalities attending the transaction, such as is required for the

Analogy of cases relating to riparian rights.

Plaintiff entitled to compensation for his easement.

creation of an easement at common law. Here the state has dedicated the streets in the city of New York to be public streets. The abutting owners have acted upon the dedication, and upon the pledge of the public faith that they shall continue to be open public streets forever. It would be gross injustice to deprive them of the advantages intended, without compensation. The dedication ought to be, and we think is, irrevocable. We conclude this part of the case with the remark that neither the Story nor the Lahr Case imposes any limitation upon the legislative power over streets for street uses. They simply hold that the trust upon which streets are held cannot be subverted by devoting them to other and inconsistent uses.

We have so far assumed that the fee to the bed of Pearl street was in the Dutch government at the time of the capitulation in 1664. But there is an admission in the case that the fee of a portion of the bed of Pearl street, including that part opposite the plaintiff's lot, had been granted to individual owners of lots on the opposite side of the street, and that the fee is in their successors in title, of which the plaintiff is not one. The original grants are not in evidence. There are some confirmatory grants referred to, made by Gov. Nicolls, which contain a condition that the grantees shall "not rear any building fabric thereupon, nor debar it [Pearl street] from being a public highway." We do not perceive that these grants either weaken the plaintiff's case, or strengthen that of the defendant. The defendant does not claim under the grantees, and, if the fee of the street is in private persons, their title is nominal merely, and as against them the plaintiff has clearly a prescriptive right, nor could such title prevent the acquisition by the plaintiff and his predecessors of rights against the public in the nature of easements, under the views heretofore stated.

Effect of individual ownership.

The court allowed the jury to consider the noise created by the trains of the defendant as an element of damage. If then the defendant had the lawful right to operate its trains in the street, such inconvenience as might result to the plaintiff in the enjoyment of his property, from the ordinary and usual operation of the defendant's road, would not, in the absence of negligence on its part, furnish a ground of action. But we held in the Lahr Case that, as to abutting owners having easements in the streets through which the road was constructed, whose rights had not been acquired by condemnation, the defendant was a trespasser. Upon general principles, therefore, it would seem that any consequential injury to the plaintiff's property

Damages—
Noise of
trains.

from the acts of the defendant, while engaged in the unauthorized occupation and use of the street, was proper to be considered by the jury. In the Lahr Case, Chief Judge RUGER, referring to this point, said: "No partial justification of the damage inflicted by an unlawful structure, and its unlawful use, can be predicated upon the circumstance that under other conditions, and through a lawful exercise of authority, some of the consequences complained of might have been produced without rendering their perpetrator liable for damages." See, also, opinion of FINCH, J., in Drucker's Case, 106 N. Y. 158, 30 Am. & Eng. R. Cas. 418.

The point sought to be raised as to the rule of damages, where the premises have been leased by the owner and were in the occupation of a tenant during the period for which damages are claimed, is not, we think, raised by any specific and proper exception, and ought not therefore to be now determined.

The rejection of evidence as to the diminution of rental value of other buildings near to that of the plaintiff, but not on the line of defendant's road, if technically erroneous, ought not, we think, to lead to a reversal of the judgment. In the early part of the trial the parties seem to have assented to a rule excluding evidence of this character. It is not at all probable, moreover, that the defendant was harmed by the ruling upon this point. These views lead to an affirmance of the judgment.

We should have been satisfied to have rested our judgment upon that in *Abendroth v. Manhattan R. Co.*, *ante*, p. 128, recently decided in the second division of this court. But the present case was originally moved for argument before the *Abendroth* Case was finally disposed of in the other branch of the court, and in view of the circumstances, and the great importance of the main question involved, we have thought it not inappropriate to express, in a supplemental opinion, our concurrence in the judgment in that case. The judgment below should be affirmed, with costs. All concur. EARL, J., concurs except as to the rule in reference to noise, and that he thinks erroneous.

Elevated Railroad—Right of Abutting Owner to Compensation.—See *Abendroth v. Manhattan R. Co.*, *ante*, p. 128, and note p. 136.

WILLIAMS

v.

BROOKLYN ELEVATED R. CO.

(New York Court of Appeals, March 20, 1891.)

Elevated Railroad—Construction in Street—Question for Jury.—In view of the decisions of this court settling the doctrine, that the placing of an elevated railroad in a city street, is inconsistent with its character as an open public street, and violates the rights of abutting owners, in an action for damages caused by the erection of such a structure, the defendant company is not entitled to go to the jury upon the fact whether the structure is an interference with the right of the plaintiff as an abutting owner, depending upon the question whether it does or does not obstruct the street.

Damages—Depreciation of Property Caused by Rumors of Contemplated Construction.—In an action to recover damages for the erection of an elevated railroad in a city street, where the city expressly limited the damages to be recovered to a time covered by the construction and operation of the road, it is immaterial whether rumors that the road was to be built, existing prior to the time of the actual commencement of the construction, did, or did not affect the rental value of the property.

Damages for Obstruction of Street While Road Was Building.—The abutting owner may recover damages for diminution in the rental value of his property, due to the obstruction of the street while defendant was constructing its road.

Trial—Misconduct of Counsel—Reading Newspaper Editorial.—On the trial of the case, plaintiff's counsel for the evident purpose of inflaming the minds of the jury against the defendant, read to them a newspaper article entirely irrelevant to the facts of the case, purporting to give an account of the death of a boy caused by his touching an electric wire, and commenting upon the neglect of the city officials to take effectual measures to prevent such accidents. *Held*, that the refusal of the court, on objection by defendant's counsel, to interfere, constituted reversible error.

APPEAL from Supreme Court, General Term, Second Department.

William N. Cohen, for appellant.

A. B. Boardman, for respondent.

ANDREWS, J.—The Story Case, 90 N. Y. 122, 7 Am. & Eng. R. Cas. 596, and those which have followed it, have settled the doctrine that the placing of an elevated railroad structure in a city street is inconsistent with its character as an open public street, and, in the absence of the consent of the abutting owners to the erection, violates their rights as such, notwithstanding the title to the soil of the way is in the municipality, and although the railroad com- Question for Jury.

pany in erecting the structure acted under both legislative and municipal authority. In view of these decisions, the contention of the counsel for the defendant, that he was entitled to go to the jury upon the fact whether the structure of the defendant was an interference with the right of the plaintiff as an abutting owner, depending upon the question whether it did or did not obstruct the street, cannot be sustained. There may be little and possibly no damage occasioned by the erection, or the existence of the road may be a positive advantage to his property, depending on the particular circumstances. Where the property owner sues for damages the jury is to ascertain and award them, and they are to be governed by the evidence in determining the amount, and whether substantial or nominal damages only shall be awarded. But it cannot be left for the jury to say whether the structure is or is not one which the legislature or the municipality may authorize as against an abutting owner, upon the theory that it is a question of fact, and not of law, depending upon the extent of the interference in a particular case with the public right of passage or with the enjoyment by the abutting owners of their premises. This disposes of one class of exceptions taken on the trial.

The original charter of the defendant was granted in 1874, but the work of constructing the road was not commenced until 1879, and was not completed until 1885, and an exception was taken to the refusal of the court to charge that no damages were recoverable for any depreciation of rental value of the plaintiff's houses, resulting from the contemplated building, or rumors of the contemplated building, of the defendant's road. There was no claim to recover for any damages except for the six years prior to the commencement of the action, viz., from November 20, 1880, to November 25, 1886. The jury were expressly limited by the court to this time, and under this ruling it was quite immaterial whether the rumors that the road was to be built, existed prior to the actual commencement of the construction, did or did not affect the rental value of the houses completed before 1879, between the time of their completion and the time when the construction was commenced, and the court was justified in declining to charge upon this abstract question. The foundation for the columns of the road were laid in front of plaintiff's premises in 1879, and the court properly submitted it to the jury to find whether the obstruction of the street, during the progress of the work, by the piers and the deposit of material used in the construction, diminished the rental value of the houses of the plaintiff during the period of construction, proof having

Damages
caused by ru-
mors of con-
struction.

been given which tended to support the plaintiff's contention upon this point.

There was no error in permitting the jury to award damages for loss sustained through the inability of the plaintiff to rent the houses from time to time, while the work was going on and after the completion of the road, where such loss could be traced to the operations of the defendant. The proof to sustain this claim was not, and from the nature of the case could not be, very definite or satisfactory, but there was evidence on the subject, and the matter could not be taken from the jury. The exceptions taken by the defendant on the trial were very numerous. There were 40 requests to charge made in its behalf. The charge covered the material questions in the case, and furnished no ground for any valid exception. The requests to charge were mainly denied. They either related to matters upon which the court had already charged, or embodied abstract or immaterial propositions, or related to questions of evidence and the credibility of witnesses, the denial of which was not legal error. We perceive no valid ground for reversing the judgment on the merits, and we should affirm it except for the ruling of the court made during the summing up to the jury.

Damages for obstruction during construction.

The counsel for the plaintiff in his address to the jury, after referring to "the utter disregard of the rights of the private citizen by corporations," proceeded to read from a newspaper, the New York Tribune, an article headed "Only a Boy Peddler," purporting to be an account of the death of a boy, "a little fellow fifteen years old, a Roumanian, a stranger in this great city [New York], selling collar buttons and pocket combs from a modest tray, to help support his mother and eight brothers and sisters," caused by his touching an electric wire which, the article stated, had been left swinging for months from a pole near which the boy had taken his stand. This was made by the writer the text for comment on the neglect of the city officials in failing to take effective measures to have electric wires placed under ground, and the article concluded with the statement: "It is shameful that where such perils are in question there should be procrastination, shiftlessness, and incompetency which would not be tolerated in a private business." When the counsel for the plaintiff commenced reading the article, the defendant's counsel interposed, and objected to the reading, and asked the court to prevent it. The court overruled the objection, and the defendant's counsel excepted. The plaintiff's counsel then resumed the reading, and was reminded by the court that the reading was under

Counsel reading newspaper article.

exception, but the counsel proceeded, and read the remainder of the article. It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve, and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense. The right of counsel to address the jury upon the facts is of public as well as private consequence, for its exercise has always proved one of the most effective agencies in the ascertainment of truth by juries in courts of justice, and this concerns the very highest interest of the state. The jury system would fail much more frequently than it now does, if freedom of advocacy should be unduly hampered, and counsel should be prevented from exercising, within the four corners of the evidence, the widest latitude by way of comment, denunciation, or appeal in advocating his cause. This privilege is not beyond regulation by the court. It is subject to be controlled by the trial judge in the exercise of a sound discretion, to prevent undue prolixity, waste of time, or unseemly criticism. The privilege of counsel, however, does not justify the introduction into his summing up of matters wholly immaterial and irrelevant to the matter to be decided, and which the jury have no right to consider in arriving at their verdict. The jury are sworn to render their verdict upon the evidence. The law sedulously guards against the introduction of irrelevant or incompetent evidence, by which the rights of a party may be prejudiced. The purpose of these salutary rules might be defeated if jurors were allowed to consider facts not in evidence, and the privilege of counsel can never operate as a license to state to a jury facts not in evidence, or to weigh considerations which have no legitimate bearing upon the case, and which the jury would have no right to consider. Where counsel in summing up proceeds to dilate upon facts not in evidence, or to press upon the jury considerations which the jury would have no right to regard, it is, we conceive, the plain duty of the court, upon objection made, to interpose, and a refusal of the court to interpose, where otherwise the right of the party would be prejudiced, would be legal error. There are many cases sustaining this conclusion. Among them are *Mitchum v. State*, 11 Ga 616; *Tucker v. Henniker*, 41 N. H. 317; *Rolfe v. Rumford*, 66 Me. 564. The reading by counsel in summing up to the jury of the newspaper article "Only a Boy Peddler" was wholly irrelevant to the case. It could have been read for no purpose except to inflame the jury against corporations, and to lead them, under the influence of a just anger excited by the incident

narrated, to give liberal damages to the plaintiff in the case on trial. The refusal of the court to interfere, under the circumstances of this case, was legal error. The privilege of counsel, and the largest liberality in construing it, did not authorize such a totally irrelevant and prejudicial proceeding. The counsel also during the summing up read a passage from the opinion of this court in the **Reading from opinion.** Lahr Case, 104 N. Y. 291, after objection taken by the defendant's counsel had been overruled by the court. It is not important to consider the exception to this ruling, as the appellant is entitled to a reversal for the reason already stated. It may be observed, however, that it is the function of the judge to instruct the jury upon the law, and, where counsel undertake to read the law to the jury, the judge may properly interpose to prevent it. But if the judge sees fit to permit this to be done, and the law is correctly laid down in the decision or book used by counsel, it would not, we think, constitute legal error or be ground of exception by the other party, although such a practice is not to be encouraged. If, however, the reading from a decision was to bring before the jury the facts of the case decided or the amount of the verdict, or the comments of the judge on the facts, to influence the jury in deciding upon the facts in the case on trial, or in fixing the amount of damages, then, clearly, the reading ought not to be permitted. We think the judgment in this case should be reversed, upon the exception taken to the reading of the newspaper article. Judgment reversed, and new trial ordered. All concur.

Misconduct of Counsel in Addressing the Jury—Attempts to Excite Prejudice Against Railways and Corporations.—In actions against railway companies it is a matter of frequent occurrence for plaintiff's counsel to attempt to gain advantage and secure a large verdict from the jury, by inveighing against railway corporations and attempting to excite prejudice and inflame the minds of the jury. It is needless to say, that with the average jury, no particular ability or skill is required to do this; a little bombast and granger oratory will usually suffice. It is also needless to say that if it can be seen that this superfluous rhetoric has an influence upon the verdict, it will be set aside. The principal case is a good illustration of this. In addition we append in this note, a digest of a number of cases showing what misconduct of this kind warrants a new trial and what does not.

In *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 37 Am. & Eng. R. Cas., 470, the action was to recover damages for the death of plaintiff's mother. Plaintiff's counsel in addressing the jury said: "These powerful railroad corporations will not do justice to anyone unless compelled to do it. If they were to kill your horse to-day, they would not pay you anything for it but they would tell you to sue and go to the court for your money and then they would fight you with all their power. They will take any advantage of you they can, no matter how just your case. Now, I hope you will make them pay the last cent you can in this case for killing their mother." *Held*, that the use of such language was improper; and that the

fact that the jury returned "for the full amount sued for" showed that it had been influenced by the language employed, notwithstanding the direction of the court to pay no attention to it.

In *Atchison, T. & S. F. R. Co. v. Dwelle* (Kan.), 44 Am. & Eng. R. Cas. 402, the action was brought to recover damages for the alleged wrongful and forcible ejection of plaintiff from a passenger train. Plaintiff's counsel in addressing the jury said, that the defendant company was a powerful corporation which holds its employes in a vise and requires them to testify at its dictation; that railroad companies are looked upon with suspicion and prejudice, and that such prejudice is well founded; that the government gave railroads a great amount of valuable land; that notwithstanding all these things, the railroad companies make a determined effort to bleed the people. Counsel further inveighed against railroad companies, claiming that they control legislation, and stating that the act in relation to the collection of excess fare was for the benefit of railroad companies, and was dictated by them. Counsel further stated that the odor around railroad offices was demoralizing, and tended to make men disregard their solemn oath; that railway employes were educated to throw baggage and destroy it, and to snub passengers, and not to give civil answers; that the employes perform the bidding of the company without regard to right or wrong; and that they testify falsely when the company wishes it; that few men dare to litigate with a railroad company because it has a legal department and is indifferent to expenses. Counsel made a comparison between defendant company and another company which he said treated everybody decently and rightfully. In speaking of witnesses who had given testimony against plaintiff, counsel made an allusion to the fact that there was a man killed about six years before and that there were some of those witnesses who would cut another man's heart out, and would kill another man's cow, and would steal another man's rocks, and that these were the kind of men whom the company brought to assail plaintiff's reputation. These statements were not based upon testimony. The court held that an excessive verdict for the plaintiff should be set aside, and a new trial granted.

In *Gulf, C. & S. F. R. Co. v. Norfleet* (Texas), 45 Am. & Eng. R. Cas. 207, the action was for personal injuries. Plaintiff's counsel in addressing the jury said: "This plaintiff after he has worked all day, suffers so he cannot sleep, and he has to work because he has a widowed mother to support." Verdict for \$2,000. *Held*, that there was no reason to believe that the language influenced the verdict.

In *Galveston, H. & S. A. R. Co. v. Cooper*, 70 Tex. 67, which was an action for personal injuries, plaintiff's counsel said to the jury: "You ought to deal severely with these bloated corporations that can run their road right through a man's house or yard." There was a verdict for the amount sued for, \$20,000. *Held*, that it was evident that the jury had been improperly influenced and a new trial was granted.

In *Central Texas & N. W. R. Co. v. Hancock* (Texas), 27 Am. & Eng. R. Cas. 325, the action was for personal injuries received while plaintiff was a passenger on defendant's train. Plaintiff's counsel in arguing before the jury said, that the case was a contest of wealth against poverty; that one of defendant's witnesses was the employed agent of the company, and had watched plaintiff, and had suborned witnesses with railroad money; that the railroad had skilled attorneys who were endeavoring to play 'cute tricks; and that the defendant was a rich corporation and had employed able counsel to denounce plaintiff for a fraud and a liar, who had endeavored to manufacture testimony wherewith to rob a rich corporation; that the defendant had cast aspersions on the good name and character of plaintiff's wife. Counsel concluded by saying: "I tell you gentlemen, such testimony and such defense as that aggravates this case. Not con-

tent with having injured, crippled and ruined him for life, they come into court and ridicule his injuries, denouncing him as a fraud and liar, and cast aspersions upon his family. You should compensate him for this, gentlemen, and teach this rich corporation that they shall not make such attacks upon the fathers of this country." *Held*, that the remarks of counsel warranted the setting aside of an abnormal verdict, and the granting of a new trial.

In *Missouri Pacific R. Co. v. Metzger*, 24 Neb. 90, 35 Am. & Eng. R. Cas. 148, the action was brought to recover the value of two horses killed on defendant's track. Plaintiff's counsel, during his argument called the attorneys for the defendant, "the hirelings of Jay Gould," and one of them "one of the leaders of the Van Wyck boom in this county now defending corporations." The court held, that the language, however objectionable, was not so far prejudicial as to justify a reversal of a judgment for the plaintiff, since the verdict did substantial justice.

In *Central R. Co. v. Mitchell*, 63 Ga. 173, 1 Am. & Eng. R. Cas. 145, it was held that the natural bias of servants or employees of a railroad company, was a matter for legitimate comment of counsel before a jury.

In *Huckshold v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 548, 28 Am. & Eng. R. Cas. 659, the suit was instituted to recover damages for the killing of plaintiff's minor son. In addressing the jury, counsel said: "In a case of this kind the law fixed the penalty at \$5000. What, in the name of common sense, do railroad companies care for \$5000. If they want to make issue, what, in the name of common sense, do they care for that? And yet they have the heart to come here, and say that you ought to find a verdict for the defendant, and let the railroad companies kill all the men and boys they please." To this objection was made, but the court declined to interfere. *Held*, that the appellate court would not reverse the judgment, since it only interferes when the discretion of the trial court has been abused.

In *East Tennessee, V. & G. R. Co. v. Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596, which was an action against a railway company to recover damages for injuries to stock, counsel for the plaintiff, appellee in this court, speaking, in his concluding argument before the jury, of an engineer who was in charge of defendant's train at the time of the injury, and who had been examined as a witness on behalf of the defendant, said: "Engineers on railroads, like this engineer have to emigrate if they do not conform to the wishes of their employers, and testify as their employers' interests require; they testify with a halter around their necks." *Held*, on exception reserved thereto by defendant, that if this had been stated as an inference or opinion, based on the witness' connection with the railroad, and with the act complained of as negligent, counsel would have kept within legitimate bounds. But having been stated as a fact, not as an inference or opinion, and the bill of exceptions, which purported to set out all the evidence, not showing any fact or circumstance in evidence which justified such a line of argument, it should have been ruled out, and the jury cautioned against allowing it to have any influence with them; and the failure of the court to so rule was a reversible error.

In *Gulf, C. & S. F. R. Co. v. Fox* (Texas), 35 Am. & Eng. R. Cas. 543, the action was for personal injuries and the plaintiff's counsel in closing his address to the jury said: "I tell you, gentlemen of the jury, that \$10,000 is no money for the plaintiff in this case. Here he is without money and without friends; in this his day of adversity you should come to his aid." *Held*, that the jury appearing uninfluenced by this appeal, the misconduct was immaterial.

In *Strouse v. Kansas City, St. J. & C. B. R. Co.*, 86 Mo. 421, 27 Am. & Eng. R. Cas. 170, the action was for personal injuries, and plaintiff's counsel in addressing the jury said, in commenting upon the absence of a ma-

terial witness: "Why won't he come? While he was in their service he swore to suit them, and will not come now to swear to the truth for fear of being prosecuted for perjury by this soulless railroad corporation." The court interfered no further than to tell the jury in substance, that they were only to consider such matters as were shown by the evidence. *Held*, that the appellate court could not say that the trial court exercised its discretion improperly.

In *East Tennessee, V. & G. R. Co. v. Gurley*, 12 Lea (Tenn.), 46, 17 Am. & Eng. R. Cas. 568, the action was for the death of plaintiff's husband. Counsel in addressing the jury said: "You can, and you should out of the abundance of this company, take enough to keep this woman and her children from want all the days of their lives." Upon objection taken at the time the court said: "Let it pass." *Held*, that all questions of punitive damages being excluded by the court, the language used by the counsel was not sufficient ground for a new trial.

In *Houston & T. C. R. Co. v. Nichols* (Texas), 9 Am. & Eng. R. Cas. 361, which was an action against a railroad company by a passenger upon one of its passenger trains for damages received by the plaintiff in an accident alleged to have been occasioned by the company's wanton disregard of its legal obligations, and by its gross negligence in running its train, and in permitting its bed and track to become grossly defective and unfit for use, wherein the plaintiff recovered \$2,000 for actual damages and \$8,000 for exemplary damages, the court trying the cause permitted the counsel for the plaintiff, in his closing argument, over the objection of the defendant, to read to the jury, as was read by plaintiff's counsel in the opening argument, the following quotations from Redfield on Carriers, coupled with the statement that the author was counsel for railway companies where he lived, viz.: "Section 539. The truth is, that common juries, with the highest instincts of justice, have always, in our country, been accustomed to view the matter of railway responsibility for passenger transportation in the light of higher and fuller responsibility than either the courts or the profession," etc. *Held*, error sufficient to entitle defendant to a new trial.

In *Battishill v. Humphreys*, 64 Mich. 514, 34 Am. & Eng. R. Cas. 69, the action was for personal injuries, and plaintiff's counsel in his argument to the jury said that the attorneys for the defendant, the Wabash system and the Vanderbilt system, received \$15,000 a year, and appealed to the prejudices of the jury with regard to Vanderbilt and Gould. The record, in this case, did not show the remarks made, or the connection in which they were made. The court did not set aside the verdict.

In *International & G. R. Co. v. Irvine*, 64 Tex. 529, 23 Am. & Eng. R. Cas. 518, which was an action for personal injuries, plaintiff's counsel in his argument to the jury used the following language: "Everybody knows that railroad companies carry their cases through all the courts of the country, and never pay any claims against them until the last measure of litigation is exhausted." *Held*, that the verdict being satisfactory, there was no reason to believe that the language of the counsel had any effect upon the jury.

In *Chicago & A. R. Co. v. Bragonier*, 13 Bradw. (Ill.) 467, the action was for personal injuries, and plaintiff's counsel read to the jury from a newspaper the following article: "That reminds me said Captain _____ of a little scene that occurred in the Board of Public Works some time ago. A gentleman was in the office who had invented a car-coupling, and like all inventors he was loud in its praises, and enlarged on the safety it insured to life and limb. Mr. _____ was in the office at the time, listening attentively to the inventor's laudation of his machine. At last, breaking in, he said: 'My friend are you aware that the thing you propose to protect is the cheapest item that a railroad has to deal with? If your machine

would save cars, sir, cars, there might be a chance for the company adopting it, as they represent property. But human beings are the cheapest things they have about them, and death only stops the wages without entailing a loss." *Held*, that this was improper and erroneous, since it only served to prejudice the jury.

In re ROCHESTER ELECTRIC R. CO.

In re WILKINS *et al.*

(123 *New York*, 351.)

Street Railway—Necessity for Consent of Local Authorities—Turnpike Corporation.—Although a turnpike corporation has acquired a right to the use and control of a town highway, the highway commissioners still have a general control over it, as a highway, and their consent must be obtained by a street railway company, before it can use such turnpike under Laws New York, 1884, chap. 252, § 3, authorizing street railway companies organized under it to acquire a right of way through streets and highways, provided, they first obtain the consent of the local authorities having control of that portion of that street or highway proposed to be used.

Same—Right to Maintain Proceedings to Acquire Lands Without Consent.—The consent of the highway commissioners to the construction of such road is an essential prerequisite to proceedings by such a street railway company to acquire title to private property along the proposed route. The right of the company to exercise the franchise of constructing and operating its road upon the highway does not become a vested right until such consent is obtained; and where this is not obtained the company cannot maintain the proceeding.

Same—Failure to File Map of Route.—Said Act of 1884, directs that proceedings thereunder to acquire land shall be as provided under the general railroad act of 1850, which expressly declares that a map or survey of the route shall be filed with the petition. *Held*, that this provision is an essential prerequisite, and the failure to file such a map with the petition is fatal to the right to maintain the proceedings.

APPEAL from an order of the General Term of the Supreme Court in the Fifth Judicial Department reversing an order of the Special Term appointing commissioners to appraise the value of lands sought to be taken for railroad purposes.

The petitioner was organized under chapter 252, Laws 1884. In November, 1887, it acquired, for a consideration, the consent of the Rochester & Charlotte Turnpike Company for the construction and operation of a street surface railway on the highway leading from Rochester to Charlotte. This turnpike company had been organized for the purpose of maintaining this highway as a turnpike, with a charter for 30 years. It had also acquired from adjoining landowners the right to a strip of land on each side of the highway for a bridle path. The consent given to this petitioner covered the use of a portion of the existing bridle path. In August, 1887, the petitioner filed a map and profile, indicating by a

line its proposed route upon the bridle path portion of the highway. In May, 1888, it instituted and carried through proceedings for the condemnation of certain lands required for the construction and operation of its road, against numerous property owners, and eventually built and put in operation an electric railroad. The present proceeding was brought in November, 1889, and by it petitioner seeks to acquire the title to the lands of the respondents, for the purpose of a railway from Rochester to Charlotte and Lake Ontario. The petition alleges incorporation, a survey of a route, an inability to purchase the right of way, and describes by metes and bounds the strip of land required by its railroad, and which is upon the eastern edge of the bridle path. It also alleges the making and filing of a map and survey, and service of notice upon landowners. It makes no mention of the railroad it had previously built, nor of the previous proceedings, nor connects this with the previous enterprise. No map was filed as alleged, and no other map was ever filed except the first one, to which no reference is made in the petition. These proceedings were opposed by the landowners, who, by appropriate denials, put in issue the allegations of the petition. The application was granted by the court at special term upon a referee's report; but, upon appeal to the court at general term, the order below was reversed, and the application for the appointment of commissioners to appraise the value of the lands sought to be taken was denied. 10 N. Y. Supp. 379. From that determination the petitioner has appealed to this court.

David Hays, for appellant.

Quincey Van Voorhis, for respondents.

GRAY, J.—The landowners have opposed these proceedings of the petitioner to acquire their lands upon various grounds, but it is only necessary to discuss two propositions, which, *in limine* seem successfully to assail the right of this corporation to take by condemnation the respondents' property for its corporate uses. The respondents say that the petitioner has not obtained the consent of the local authorities of the town of Greece, and that it has not made and filed a map or survey of the proposed route. To the first of these objections, the petitioner answers that the portion of the highway in question lies neither in a city nor in a village, and that the statute has failed to specify who are the proper "local authorities" when the highway is in a town, and has left that question open. It relies upon the consent obtained from the turnpike company as all sufficient, and as emanating

Consent of
local author-
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pike Co.

from an authority in actual control of the highway. In this contention, the petitioner, I think, is clearly wrong. Chapter 252 of the Laws of 1884, under which this corporation was organized, was passed to provide for the construction, extension, maintenance, and operation of street surface railroads in cities, towns, and villages. By its third section, it was enacted that any company organized under it, as well as any theretofore organized, "may construct, maintain, operate, use, and extend a railroad, or branches, on the surface of the soil, through, upon, and along any of the streets * * * or highways of such cities, towns, and villages, and also through * * * any private property which said company may acquire for the purpose: * * * provided, that the consent in writing of the owners of one half in value of the property bounded on, and the consent also of the local authorities having control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad * * * be first obtained." Then follows a provision that in cities a common council, and in villages the board of trustees, shall be the local authorities to give consents. The argument of the appellant is that, the statute being silent as to who shall be the local authority for the purpose of consenting in towns, such consent may proceed from the authority in actual control; that the turnpike company is such an authority, and exclusively operates and controls the highway, and only its consent was necessary. There are two objections to this argument. In the first place, it disregards the true, or legal, significance of the term "local authorities" as used in the act; and, in the next place, it assumes that the highway commissioners' authority has been wholly divested by the organization and operation of the turnpike company. The "local authorities," to whom the statute refers as the source of the consent to be given, are the officers of the city, town, or village whose duties and powers relate to the supervision, care, and maintenance of the streets or highways; and it would be a misuse of language to attach any other sense to those words. It is very evident, by reference to the connection in which the legislature frequently uses the term "local authorities," that what is meant is those officers on whom the administration of the government of the particular political subdivision of the state, by virtue of their office, devolves, in relation to the subject matter of the legislative provision. I think we need not delay to enforce this seemingly self evident proposition by abundant illustrations from the laws. A turnpike corporation is not a local authority, and its consent is only good for what it may be worth, relatively to its own

Local authorities defined.

rights and interests in the matter. The highway has not ceased to be such because of becoming a turnpike, and all authority of the highway commissioners has not been taken away by that change. *Walker v. Caywood*, 31 N. Y. 51. Whatever the interests, and however exclusive the rights, and comprehensive the duties, of the turnpike corporation over the highway, the administrative duty of the highway commissioners of the town remains unimpaired, in so far as its exercise may be demanded for the preservation and protection of the interests of the public. These companies are private corporations, whose organization is, primarily and principally, for private gain; and shall they be deemed conservators of the public interests? That would be an absurd proposition. Supervision and control over the public highways are vested in the local authorities to prevent illegal encroachments upon the public highway by the turnpike company, or from any other direction. *Walker v. Caywood, supra*. The highways are held in trust by the state for the public, and they are controlled through the instrumentalities of local authorities. Section 1, art. 1, tit. 1, chap. 16, pt. 1, Rev. St. N. Y. Though a turnpike corporation acquires a right to the use and control of the highway for its purposes, some duty of supervision and some control still remain in these local authorities. The adjoining landowners and the public generally are interested in having the highway maintained suitable for the public use, and in preventing their diversion to other uses, or their subjection to other burdens, until there shall exist some controlling reason and a due authorization for the new use. It cannot properly be said that this turnpike company—this private corporation—has so far succeeded to the powers and rights of the town officers as to be able to determine such questions for and to release the interests of the public. The highway commissioners are vested with the general control over the public highways, and they have a duty to perform towards the public in connection with their proper maintenance as such.

The next phase of the question which presents itself then is, if the consent of the highway commissioners, as the local authorities having control over the highway in question, has not been obtained, is that consent an essential prerequisite to the right to maintain this proceeding? That would seem to be the inevitable conclusion, based upon the language of the statute, in its plain reading; and it is, I think, fortified by reasoning and by authority. The authority conferred by the act of 1884 is to construct and operate the railroad through the street or highway, and to acquire private property for that purpose:

Consent prerequisite to maintenance of proceedings.

provided, that the consents of the property owners and the local authorities be first obtained. The language imports a condition to the right of the company to proceed after its organization in the work of construction. The consents which are to be first obtained are to the construction and operation of any railroad at all, as proposed. Its condition, after the work of formal organization is complete, is still an incomplete or imperfect one. The legislature, in the general law of 1884, followed the constitutional requirements as to the consents to be obtained from property owners and from the local authorities. The design of the people, as manifested in the constitution, and again in this act, was to guard the public generally against these invasions of streets and highways by railways under authority of legislative grants; and the protection was provided for by the imposition of the conditions, in every case of a projected street railroad, that the project should be approved by the local authorities, and by a certain proportion of property owners, with the permission, if the requisite consents of the property owners were refused, to apply to the court, whose determination might stand as a substitute for such consents. Sufficient vitality and strength to go on with and to construct a railroad do not exist in the newly formed corporation, until infused by the consents of the local authorities and property owners. Until that moment when the company can assert that the statutory conditions of its right to be and to do are fulfilled, it cannot strictly nor justly be said that it is in a position legally to deprive a landowner of his property. By an organization under the act, it has become a corporation, but with no authority as yet to construct and operate a railroad upon a street or highway. Its right to the exercise of that franchise is still inchoate, and does not become a vested right until after the consents specified by the statute have been obtained. It may be a corporation, but it has no power to take a step in the direction of occupying the street or highway, because it is in effect inhibited by the condition of its charter from doing so, while the consents to the appropriation of the street or highway to railroad uses are lacking.

In re Thirty-Fourth St. R. Co., 102 N. Y. 343, objections were made by the property owners to the granting of the company's application for the appointment of commissioners to determine whether the proposed road ought to be constructed; and one of them was that, as the route was in part coincident with the routes of existing street railroads, their consent had been refused. As the act provided that the consent of other companies should be obtained in such cases, the point was made that it would

Same—
Authorities
reviewed.

be futile to proceed in the matter while the consents were lacking. Though that consent was needed by the company before it could occupy the street, Judge ANDREWS' opinion in the case proceeded upon the theory that it was an independent condition, and it was not an element of the authority of the court to proceed upon the particular matter before it. That proceeding was instituted to meet that condition of the act, which required that, if the consent of property owners was refused, the determination of the court in lieu thereof should be had. The only prerequisite to such application, as Judge ANDREWS held, was "an inability to obtain the consent of property owners." As it was not a proceeding to take private property by condemnation, but was a step in the direction of obtaining one of the consents needed, as preliminary to the work of construction and operation, his language that the act did not prescribe the order in which the several consents shall be obtained obviously has reference to the consents, which were precedent conditions to operation of the company's franchises. In his opinion he holds that there were three precedent conditions to which the right of the company to construct and to operate was subject, namely: "The consent of the local authorities; the consents of property owners, or, in lieu thereof, the determination of commissioners in its favor; and the consent of the companies having coincident routes." The opinion bore upon the question of whether the proceeding for the appointment of commissioners to determine as to the petitioner's project, as a substitute for the required consent of property owners, ought to be maintained; and it may be distinctly read as an authority in support of the proposition that precedent conditions are affixed by the act to every charter, and their fulfillment must be shown before construction and operation can be initiated, or steps thereto taken by the corporation.

The opinion of this court *in re* New York Cent. & H. R. R. Co., 77 N. Y. 248, contains nothing adverse to these views. That was a proceeding under the general railroad act to acquire a tract of land along the river front, which was intersected by streets; and the point was made that the order appointing the commissioners, etc., did not give the petitioner control of the streets of the city, and the petitioner might not be able to carry out its plans, and hence the condemnation of private interests in land should not be permitted. MILLER, J., there said that "there is no rule which requires that under the circumstances presented, where different rights are essential in order to acquire an interest in and for railroad purposes, the acquisition of one interest should precede the other, or that proceedings should be had to acquire each of them at

the same time." The learned judge held that the consent of the city was not necessarily preliminary to the acquisition of the land of the appellants, and might be lawfully obtained after the right to the land has been acquired. The provision of the general railroad act referred to was not in the shape of some condition inhibiting or suspending the operation of the chartered franchises of the company to construct and operate its railroad. It was merely a limitation upon the construction to be placed upon the statute. The provision was that nothing contained in the act should be construed as authorizing the construction of any railroad in the streets of a city without its assent. The effect of that limitation was not to prevent any construction and operation of the railroad; but, where the railroad company, in the operation of its franchises, sought to make any use of streets in a city, the general authority of the statute should not be deemed to extend to that use without the assent of the municipality. So the opinion in the case cited has no relevancy to the case at bar. We are furnished with a judicial construction of the force of language precisely similar to that which gives rise to our present discussion.

In re Kings Co. El. R. Co., 105 N. Y. 97, it was sought to appropriate an interest in lands to the use of the railway, and the proceeding was there, as here, to obtain the appointment of commissioners of appraisal. The petitioner there was organized under chapter 606 of the Laws of 1875, commonly known as the "Rapid Transit Act;" and the point *inter alia*, was taken, in opposition to the right of the petitioner to maintain the proceeding, that it never obtained the consent of the local authorities having control of that portion of the street upon which it was proposed to construct the railway. The rapid transit act provided that "the consent of the owners of one-half the property, * * * and the consent also of the local authorities having the control of that portion of the street or highway upon which it is proposed to construct or operate such railway, be first obtained." Judge DANFORTH, who delivered the opinion in that case, in the course of it, construed that provision to mean that, "until the consent of each was obtained, nothing could be done by way of construction." That eminent jurist held that "the power contingently conferred by the legislature to construct the railway became absolute, for the conditions, imposed upon its exercise had both been performed. The abutting owners had consented, and so had the municipal authorities." It would be manifestly unjust to hold otherwise as to the necessity of first showing compliance with these constitutionally imposed conditions before a proceeding can be maintained which has for its end

the taking of private property against the consent of its owner. His interests should not be permitted to be affected by the burden and cloud of such proceedings, when it does not appear that the right to construct its railroad is yet vested in the corporation.

The further ground taken by the property owners, in their efforts to oppose the appropriation of their property, is that a map should have been filed by the petitioner.

**Failure to file
map of route.**

Authority to acquire private property for its railroad purposes is conferred upon petitioner by the act of 1884, and the mode of its exercise is through the proceedings described in the general railroad act of 1850. The corporation, which is formed under the act of 1884, is given the powers and privileges granted by that general act, and reference to its provisions shows in what manner and by what special proceedings real estate may be acquired when there is an inability to acquire it by agreement. The act of 1850 details what the petition which initiates the proceedings must contain by way of allegation for the purpose, and what, therefore, must be proved to the court. Among other things, the petition must allege that the company has made a map or survey by which its line or route is designated, and that they have located their road according to such survey, and filed certificates of such location in the clerk's office of the county. This allegation was denied; and it was not proved, and it is not pretended, that any map was made and filed of the route, in connection with which this proceeding is sought to be maintained. The appellant argues that a map is not required in the case of street railroads; or, if it is, that the one filed upon the previous proceeding of the petitioner was sufficient. The point is untenable. For the validity and force of such a proceeding, it is essential that all the steps pointed out by the general statute should be strictly followed. It may be that in this particular case no prejudice would be worked by the failure to make and file a map; but the question is not of the particular necessity, but it is one which goes to the foundation of the right of the petitioner to maintain the proceeding. Where it is sought, by resort to the special proceedings authorized by the statute, to take lands *in invitum* the owner, they must be followed strictly, or they are unavailing. It is only where the steps are all taken which the sovereign power has prescribed that title to the private property is transferred from its owner. The rule is too familiar to require discussion at this day that a statute authority in derogation of the common law to divest the title of one must be strictly pursued, and all prescribed requirements strictly observed and conformed to, or it will be ineffectual for the purpose. *Sharp v.*

Speir, 4 Hill (N. Y.), 76-86; *Adams v. Saratoga & W. R. Co.*, 10 N. Y. 329; *In re City of Buffalo*, 78 N. Y. 362, 366; *In re Water Com'rs*, 96 N. Y. 351, 357. The fact that the proceeding is for the purpose of acquiring private property is argument enough, if any argument were needed, in behalf of a statutory prescription. The landowner is entitled to the notice provided for, and to the opportunity of knowing exactly by the map and survey, which has been made and filed, where and how the line or route of railroad is projected. Such knowledge is evidently of so practical and available a character that it is provided for in order to enable the property owner the more readily to determine the question of acquiescence or of opposition. But discussion is endless on this head. The act of 1884 refers the company to the provisions of the general act of 1850 for purposes of acquiring private lands, and no reason in law exists why those provisions should not be as binding, and the protection to the private citizen be as sacredly maintained, in the case of a street railroad as in that of a steam railroad. The rule is a salutary one, and should be respected for that reason, as well as for its absolute-ness under the statute. For the reasons expressed in the foregoing opinion the order appealed from should be affirmed, with costs. All concur, (EARL, J., in result, on last ground discussed in opinion,) except RUGER, C. J., not voting.

Eminent Domain—Filing of Map of Proposed Route.—See *Cory v. Chicago, B. & O. R. Co.* (Mo.), 44 Am. & Eng. R. Cas. 163, note 189; *West v. Milwaukee, L. S. & W. R. Co.* (Wis.), 10 *Id.* 415; *Chicago & Northwestern R. Co. v. Chicago & Evanston R. Co.* (Ill.), 25 *Id.* 158; *Murphy v. Kingston & P. R. Co.* (Ont.), 25 *Id.* 179.

Construction of Railroad in Street—Consent of Local Authorities.—*Pembroke v. Canada Cent. R. Co.* (Ont.), 14 Am. & Eng. R. Cas. 117; note 20 *Id.* 164.

Condemnation of Land for Street Railway—Power to Condemn Land for Line Which Does not Run Along Streets.—In *South Beach R. Co. v. Byrnes*, 119 N. Y. 141, it was held that a company organized to construct and operate a street railroad along certain specified streets, cannot condemn land for the purpose of constructing a railway line no part of which runs on said streets, under the New York Railroad Act of 1850, which allows a railroad corporation to condemn such land as is "required for the purposes of its incorporation." The court said: "The power is not general and unlimited. The company cannot condemn what it pleases, but only such and so much land as the proper execution of its corporate purposes shall require and render necessary. What, then, were the purposes of the incorporation of the South Beach Railroad Company? Obviously, they are those, and those only, which the law of its organization describes and defines, and which are certified in its articles of association, operating when filed as its charter, and the measure of its authority. Referring to those, we see that the corporate purposes were not to build a railroad between specified termini by the most feasible route, which is the characteristic of an ordinary railroad, but to build and operate a street railroad such as the act of 1884 contemplates and regulates; and, not only that, but one running along three specified avenues in the town of Edgewater, and not at all through

or along private property. Such are the prescribed and declared purposes of the incorporation; and the company, it may be conceded, might have the right to acquire by condemnation such and so much of private property as should be reasonably necessary to accomplish those purposes. Now, the chief element of a street railway as authorized by the act of 1884 is that it is built upon and passes along streets and avenues for the convenience of those living or moving thereon. Its fundamental purpose is to accommodate the street travel, and its motive power is dictated and regulated to that end; and while, consistently with its general object, it may need for switches or storage or stables or stations the land of private owners, yet that necessity is only incidental to the main purpose of a line along the streets accommodating the street travel. Here, the land of Mrs. Byrnes is needed to build the main and principal part of the line, only that it may avoid the streets altogether. The act of 1884 stamps an indelible mark upon the corporations which it organizes. The consent of the local authorities is to be obtained, and that of a certain portion of the abutting owners; or, in default of the last, the certificate of chosen commissioners. Every step of the way, through all the conditions of the act, it plainly contemplates a railway along the streets and avenues of a village or city."

Dedication of Land for Street by Railway Company—What Does not Constitute—Agreement With City.—Where a railroad company desired to have a portion of an alley vacated in order to build a passenger depot, and presented a petition to the common council offering to donate to the city a certain strip of ground to be used as a street or alley in consideration of the vacation of the said alley, and the city, through its proper officers, rejected the proposition of exchange by failing to act thereon, but assessed the benefits to the company growing out of the vacation of the said alley at a certain sum, which sum was paid by the company into the city treasury, and afterwards the company, for the purpose of making a convenient and necessary way of approach to, and egress from, its passenger depot, curbed and paved the strip of ground which it had proposed to donate to the city, and constructed convenient and necessary gates, all of which was done at its own expense, the said strip of ground did not become a public street of the city, subject to a right of all the citizens to use it as a public thoroughfare. An abutting property owner could not enjoin the company from erecting a fence along the boundary of said strip of ground. *Pennsylvania Co. v. Plotz*, 125 Ind. 26.

Condemnation of Company's Lands for Street—Permission by City to Another Company to Lay its Tracks in Such Street—Compensation.—Where a city instituted condemnation proceedings against the plaintiff railroad company for the purpose of extending a street through its land, and a decree was entered by consent condemning the land for street purposes and providing that the company "shall have the right to keep and maintain its present tracks and switches upon said land, and shall have the right to construct such other tracks, switches and turnouts upon said land and across said street, when opened, as it may deem necessary for the transaction of its business; such reservation is not the grant of an exclusive privilege, but only equivalent to the usual permission to occupy the street with its tracks, and plaintiff is not entitled to compensation from defendant railroad company laying its track along the street by permission of the city and across plaintiff's tracks therein, nor can it enjoin defendant from so laying its track, when authorized by the city to do so. Such crossing of plaintiff's tracks by the defendant's track, and the delay incident to plaintiff's trains by the passage of defendant's trains over the latter's track, is not a taking or damaging of private property, each having an equal right to use the street. *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457.

Railroad in Street Constructed by Manufacturing Corporation—Assent of Municipal Council.—In *Barker v. Hartman Steel Co.*, 120 Pa. St. 551, it appeared that a manufacturing corporation with the consent of the borough authorities, and under a lease from the railroad corporation organized under the laws of the state, constructed and operated a railroad on one of the public streets of such borough, plaintiff's property was thereby lessened in value, and rendered difficult of access. He brought a bill to enjoin defendant from running and operating its cars on such street. *Held*, that the plaintiff was entitled to the relief for which he asked. The court said: "It is hardly necessary to cite authorities to prove that a railroad corporation, vested with rights of eminent domain, cannot, without express authority of law, sell, lease, or transfer the rights, or any part of them, to private persons, nor even to another railroad company. In *Wood v. Railroad Co.*, 8 Phila. 94, Judge SHARSWOOD states this well known principle very clearly and forcibly, and refers to a number of authorities which I will not reproduce. The defendant obtained no right of eminent domain under the alleged lease (which instrument, by the way, does not seem to have been produced before the master), and the council of the borough could not legally authorize that to be placed on the street which, according to the evidence, is both a public and private nuisance. Under the authority of *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514, the plaintiffs are entitled to the relief for which they ask. Had the invalidity of the lease been brought more specially to the attention of the master, doubtless he would have reached the conclusion here announced. No opinion respecting the right of the railroad company to occupy the street need be here expressed."

Mandamus to Compel Company to Reconstruct Public Road Which it Has Taken.—In *Commonwealth ex rel. Keyes, et al. v. New York, P. & O. R. Co.*, 138 Pa. St. 58, it was held that the road commissioners of a township without the consent of the attorney general, may begin proceedings by *mandamus* to compel a railroad company to reconstruct a public road which it has taken.

Trespass Upon Highway by Railway Company—Offense Against Possession and Not Against Fee.—In *Fitch v. Boston & P. R. Co.* (Conn., Sept. 12, 1890), 20 Atl. Rep. 345, the action was in trespass by the owner of the fee in a highway against a railway company in possession of land, which it had condemned, adjacent to the highway. It appeared that defendant was constructing on the condemned land the approach to a bridge over a river, and the acts of trespass on the highway complained of were in connection with the building of the bridge, and would cease on its completion. The court *held*, that, as these acts did not offend against the fee, but merely the possession, plaintiff could not maintain the action.

Conveyance by City of Right of Way to Railroad Company in Consideration of Change of Route by Company—Construction of Deed.—In *Long v. Louisville & N. R. Co.* (Ky., Feb. 18, 1890), 18 S. W. Rep. 3, it appeared that the city of Louisville condemned a strip of land for railroad and sewer purposes. It constructed the roadbed along this line, and conveyed to the defendant company, "its title to the roadbed, bridges, and right of way" along the entire route, and "all the land belonging to the city," between certain streets, for depot purposes. This conveyance was made in consideration of the change of the railway from a street which it had formerly occupied for a right of way for a double track, to the street forming the line of the road in the conveyance. *Held*, that except as specified in the conveyance, nothing was conveyed to the company along the route outside of the bare roadbed.

Construction by City of Viaduct Over Railroad Tracks—Agreement by Company to Indemnify City.—In *Chicago, B. & Q. R. Co. v. City of Chicago*

(Ill., Oct. 31, 1890), 25 N. E. Rep. 514, it was held that the Chicago, B. & Q. R. Co. was liable for a judgment recovered against the city of Chicago for damages caused to property by the construction of a viaduct, the expense of which the company had agreed to bear in consideration of permission given it by the city to lay its tracks along a certain street, and had also agreed to indemnify the city "from any and all legal damages, judgments, decrees, and costs and expenses of the same which it may suffer, or which may be recovered or obtained against said city, for or by reason of the granting of such privileges and authority, or resulting from the passage of this ordinance, or any matter or thing connected therewith."

STATE

v.

COZZENS.

(*Louisiana Supreme Court, November 17, 1890.*)

Amendment of Laws by Reference to Title—Municipal Ordinances.—Article 30, of the Constitution of Louisiana which prohibits the amendment of laws by reference to the title, applies only to the acts of the General Assembly, and not to ordinances of municipal corporations.

Street Railways—Municipal Regulation—Judicial Interference.—Under the power expressly granted to the city of New Orleans to regulate the use of its streets by railways, a discretion is vested as to method and means of regulation, which will not be judicially interfered with, unless manifestly unreasonable and oppressive.

APPEAL from Recorder's Court, Parish of Orleans.

Girault Farrar, for appellant.

T. McC. Hyman, for the state.

FENNER, J.—This appeal involves the legality and constitutionality of ordinances Nos. 555, 3632, C. S. city of New Orleans. The first ordinance makes it the duty of railway companies "to station at each intersection of any street within the city of New Orleans on which street cars are running, at least two minutes before the approach of any of their trains, a watchman, who shall remain on the spot until after the passage of the train, with a red signal flag in the day-time and a red lantern at night time, to signalize the approach of the train." The second ordinance inflicts a penalty of fine or imprisonment on any engineer or person in charge of a train who shall violate said ordinance by crossing his train over such streets, without being flagged as therein provided. We are favored with no brief on the part of appellant. We glean from the record that he attacked the validity of the

amendatory ordinance No. 3632 on the ground of conflict with article 30 of the constitution, which prohibits the amendment of laws by reference to the title, and requires that the act as amended shall be recited in full. This provision applies only to acts of the general assembly, and not to ordinances of municipal corporations. *Walters v. Duke*, 31 La. Ann. 668.

In other respects the ordinances present an exercise of the power expressly granted to the city in its charter "to authorize the use of the streets for horse or steam railroads, and to regulate the same." We discover nothing in this regulation so unreasonable as to justify our interference with the large discretion vested in municipal corporations in such matters. Judgment affirmed.

Municipal Regulation of Street Railway Companies.—See *State v. Trenton* (N. J.), 32 Am. & Eng. Corp. Cas. 445, note, 452; *State v. Heidenhain* (La.), 43 Am. & Eng. R. Cas. 287; *City of Toronto v. Toronto St. R. Co.* (Ont.), 36 *Id.* 44

SIoux CITY STREET R. CO.

v.

SIoux CITY.

(138 *United States*, 98.)

Street Railway—Franchise—Paving Street—Obligation of Contract.—Section 1090, of the Code of Iowa, provides that the franchises of corporations thereafter created shall be subject to such conditions as the legislature may impose, as necessary for the public good. Under this provision, a city may, by ordinance, require a street railway company to pave the street outside of its rails, although such company had constructed its track under an ordinance giving it the right to operate its road upon the condition that it pave the street between the rails only. The construction of the road under the first ordinance, did not constitute a contract between the company and the state or the city, the obligation of which was impaired by the laying of a special tax against the company for the cost of paving outside the rails.

Affirming 78 Iowa. 367, 40 Am. & Eng. R. Cas. 275.

IN error to the Supreme Court of the State of Iowa.

J. H. Swan, for plaintiff in error.

D. B. Henderson, for defendants in error.

BLATCHFORD, J.—The Sioux City Street Railway Company became a corporation on December 6, 1883, under the general incorporation laws of the state of Iowa. On the 12th of December, 1883, the city of Sioux City, by an ordinance of the city council, conferred upon Case stated.

the company the right to locate, operate, construct, and maintain street railways upon and along certain streets in the city, on the terms and conditions specified in such ordinance. Section 11 of the ordinance was as follows: "§ 11. Whenever, by resolution of common council, any street or part of street on which said track shall be laid and operated shall be ordered paved or macadamized, either at the expense of the city or owners of abutting property, then the said proprietors of said street railway shall pave or macadamize, in the time and manner directed, the space between the rails, and shall thereafter keep the same between the rails in good repair, and shall keep in good condition and repair the space between the tracks on all bridges that they cross." On the 18th of December, 1883, the company accepted the ordinance. Prior to March 18, 1884, the company had expended over \$10,000 in constructing tracks on certain streets, and for other purposes, and had contracted for material and supplies for constructing other tracks, and had its street railway in operation on certain streets, in accordance with the terms of the ordinance. On March 15, 1884, the legislature of Iowa passed an act entitled "An act granting additional powers to certain cities of the first class, with reference to the improvement of streets, highways, avenues, or alleys and to provide a system of payment therefor." The sixth section of that act provided as follows: "All railway companies, and street railway companies, in cities of the first class, as provided in section one of this act, shall be required to pave, or repave, between rails, and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue, or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails shall be done at the same time, and shall be of the same material and character, as the paving or repaving of the street, highway, avenue, or alley upon which said railway track is located, or of such other material as said council may order, and, when said paving or repaving is done, said companies shall lay, in the best approved manner, the strap or flat rail. Such railway companies shall keep that portion of the streets, highways, avenues, or alleys between, and one foot outside of, their rails up to grade, and in good repair, using for such purpose the same material with which the street, highway, avenue, or alley is paved upon which the track is laid, or such other material as said council may order." Laws 1884, p. 22. On January 15, 1886, the city of Sioux City became a city of the first class, under the statutes of Iowa, and has continued to be such. On the 11th of May, 1886, the city council passed an ordi-

nance entitled "An ordinance providing for the paving of the streets between the rails of railways and street railways located thereon, and defining the manner of making special assessments to defray the cost and expenses thereof, and the manner of enforcing and collecting the same," the first section of which provided as follows: "Section 1. That, whenever the city council," etc., "shall cause to be paved any street, avenue, or alley whereon any railway has or shall be located and laid down, they shall also order and provide, by resolution, that the company or persons owning said railway or street railway pave said street, avenue, or alley between the rails of said railway or street railway, and one foot each side the rails thereof, at their own expense and cost; provided, that the provisions of this section shall not in any manner be construed to affect any rights accrued or existing in favor of said railway companies or street railway company, under any franchise or license heretofore granted, under any ordinance heretofore adopted by said city council." Under this ordinance, and a subsequent one passed May 25, 1886, and a resolution passed August 31, 1886, the city council ordered certain streets to be paved, including those parts as to which the assessments involved in this suit were imposed, and provided for assessing to the street railway company the cost of paving the space between the rails, and one foot outside thereof.

The assessment of a special tax against the company for the cost of paving the space outside of the tracks was made December 27, 1886. Prior to that time, the company had paid for so much of the paving as lay between the rails of its tracks. In proper time, after the resolution of August 31, 1886, was served upon the company, it filed its written objections thereto, as follows: "The Sioux City Street Railway Company objects to the resolution ordering the assessment of a special tax against said company for the cost of paving one foot outside of its railway tracks in improvement districts 2 and 3. It objects to having the cost of paving one foot outside of the railway track charged to it, or to have same in any manner assessed against it or against its property, and to having any resolution or ordinance passed charging the cost of said paving to it, or making any assessment against it, or against its property, or seeking in any manner to collect said cost from it, or making same a lien upon the title to any of the property, by any ordinance, resolution, or confirmation purporting to charge such cost against the said company or its property; that by the terms of the charter granting the company the right to locate, construct, and maintain its said railway, it was expressly provided that the company should only

be required to pave so much of the street wherein the track was constructed as should lie between the rails of said track; that the city of Sioux City thereby expressly contracted and agreed that this company should have the right to locate, construct, operate, and maintain its said track in said streets, and should only be required to pave or keep in repair that portion thereof lying within the rails of its said tracks; that the said company, relying upon the charter and the ordinance granting it the right to locate and construct the tracks on the said streets herein named, and the provisions and conditions thereof, located, constructed, and has since operated its track and railway on the said streets, and has in all respects complied with all the conditions and requirements imposed upon it by said city by the said ordinance; and that said assessment of costs of paving one foot outside the rails of said railway tracks is a violation of the grant and contract of said city to and with this company, and is illegal and void." Notwithstanding this, the city council, on the 15th of March, 1887, overruled the objections of the company, and confirmed the assessment. Under this state of facts, the company, on the 30th of May, 1887, filed in the district court of the county of Woodbury, in the state of Iowa, its petition against the city of Sioux City and the city council of Sioux City, setting forth the foregoing facts, and averring as follows: "That, by the terms of the charter granting to the plaintiff the right to locate, construct, and maintain said street railway, it was expressly provided that plaintiff should only be required to pave so much of the street whereon it constructed and operated its street railway as should lie between the rails of its said track, and the city thereby expressly contracted and agreed with plaintiff that, in consideration of its constructing and operating the said street railway over said streets, it should have the right so to do, and only be required to pave and keep in repair so much of the street as lies between its rails: and said company, relying on the ordinance and contract of said city, located and constructed at great expense said track, and has ever since operated and maintained the same; and the said ordinance and resolution, requiring plaintiff to pay the cost of paving one foot outside of the track of the railway, is a violation of said contract granting it the right to locate and construct the said railway. The said city council erred in passing said ordinance and resolution requiring plaintiff to pay the cost of paving one foot outside of their tracks, and erred in overruling their objections to the special charges and assessments made against said company for said cost of such paving, and in determining that the said cost of such paving should be charged to said plaintiff and

against the property, and erred in confirming said special assessments." The petition prayed for the issuing of an order for a writ of *certiorari* to the city council, and for a reversal of its action. On the 11th of February, 1889, the petition was amended by averring that § 6 of the act of March 15, 1884, in so far as it sought to impose upon the company the paving of one foot outside of its track, or to impose upon it the cost thereof, was a violation of subdivision 1 of section 10 of article 1 of the constitution of the United States as impairing the obligation of a contract, and that the ordinances of May 11, 1886, and May 25, 1886, and the resolutions of August 9, 1886, and December 27, 1886, were a violation of the same subdivision. The defendants filed a demurrer to the petition and amendment, as follows: "That the facts stated herein do not entitle the plaintiff to the relief demanded, for that (1) the said ground for relief, as stated in said petition and amendment thereto, is that the action of said city and its city council, in assessing the cost of paving of one foot outside the rail of the tracks of plaintiff's railway, impairs the obligation of the contract made between said city and plaintiff, while said petition and amendment thereto discloses that such is not the effect of said action of the city: (2) that said petition and amendment thereto shows that, in making said assessment, the city of Sioux City, by its common council, only complied with the provisions of the law of the state of Iowa authorizing said assessment, and then in force: (3) that the said plaintiff took its charter as a corporation from the state, subject to the reserved power of the state to abridge or modify said charter, and to regulate, withhold, or impose any other conditions upon any franchise obtained by said corporation, and the said plaintiff took said franchise and ordinance from said city, subject to the rights of said city to make any charge or assessment against its property which the legislature might provide by statute." The district court sustained the demurrer, dismissed the petition, and confirmed the assessments. The plaintiff appealed to the supreme court of Iowa, which affirmed the judgment, its opinion being reported in 78 Iowa, 367, 40 Am. & Eng. R. Cas. 275. Section 1090 of the Code of Iowa, which was in force when the railway company became incorporated, provided as follows: "Sec. 1090. The articles of incorporation, by-laws, rules, and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged, or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld, or be

subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good." The supreme court of Iowa in view of § 1090, held that the city of Sioux City, by granting the authority to construct and operate the railway on the condition of paving between the rails, did not limit its authority to make and enforce other regulations and requirements, as authorized by § 1090; that, although, by the contract, the company bound itself to pave between the rails, the city did not bind itself not to exercise the authority conferred upon it by § 1090 to impose other conditions upon the exercise of the franchise of the company, which, in the judgment of the city, might be required for the public good; and that the city was authorized to impose on the company the burden of the additional paving outside of the rails.

No question is raised as to the regularity or legality of the proceedings for assessment for the cost of paving outside of the track, except the question of the power of the city to impose the assessment, in view of the franchise granted to the company. The only contention is that, in view of the provision of section 11 of the ordinance of December 12, 1883, there was no power in the city to require the company to pave anywhere except between the rails. On the other hand, the defendants contend that section 11, while requiring the company to pave between the rails, does not provide that it shall be required to pave only between the rails. Reference is also made by the defendants to section 8 of the ordinance of December 12, 1883, which provides for the payment by the company, into the city treasury, of an annual license fee of \$25 on each car used by it, "in addition to the other taxes lawfully assessed and collected;" and it is contended that, as the legislature subsequently passed a general law requiring all street railway companies to pay for the cost of paving one foot outside of the rails, this tax or assessment was charged lawfully against the company. It is also contended that, no matter what the provisions of the ordinance were, it was within the power of the legislature to enact laws imposing an additional tax upon the company, and within the power of the city, acting under such a law, to make the charge upon the property of the company, and that, under section 6 of the act of March 15, 1884, the assessment and tax in question were made against the property of the company, and the city merely carried out the direction of the statute, and did not impose the additional burden by its own voluntary act. The company took its franchise subject to such legislation as the state might enact. This is plain from the provisions of section 1090 of

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the Code. The company took its charter subject to the provisions of that section. The general assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the city, by any contract with the company, to deprive the legislature of the power of taxing the company. *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528; *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 2 Am. & Eng. Corp. Cas. 122; 2 Mor. Priv. Corp. §§ 1061, 1062, 1066, 1085, 1095, 1097. Under section 1090 of the Iowa Code, the legislature had the power not only to repeal and amend the articles of incorporation of the company, but to impose any conditions upon the enjoyment of its franchise which the general assembly might deem necessary for the public good. The reservation of this power was a condition of the grant. The city council could make no arrangement with the company which would not be subject, under that section, to the superior power of the general assembly. The cases referred to by the plaintiff in error of *City of Des Moines v. Railway Co.*, 41 Iowa, 569, and *City of Burlington v. Railway Co.*, 49 Iowa, 144, are not applicable to the present case, because in them there was not involved any question of the power of the state to impose additional burdens or conditions on the enjoyment of the franchise; and section 1090 of the Code was not in any manner involved or referred to in them. The questions raised in the present case relate solely to the subject of taxation, which is a matter under the authority of the state. Moreover, the city derived from the state alone its power to grant a license to the company. The right to operate the railway in the streets is a franchise obtained through power given to the city by the state, but the state reserved the power to regulate such franchise, and impose conditions upon it. It reserved the power to determine the question of the exemption of the company from taxation, and to prescribe what burdens should be imposed upon it for the public good, in the enjoyment of its franchise. Manifestly, such power of the state would exist, if the right to occupy the streets with tracks were granted to the company directly by an act of the legislature of the state, and the case is not changed by the fact that the franchise was granted by the city. There is nothing in the ordinance of the city council which takes away the power of the state and the city to impose additional taxes on the property of the company, or which indicates an intent that no further or different tax should be subsequently imposed on its property.

Delaware R. Tax, 18 Wall. (U. S.), 206, 227; Union Pass. R. Co. v. Philadelphia, 101 U. S. 528, 536; Easton Bank v. Com., 10 Pa. St. 451. No question can arise as to the impairment of the obligation of a contract, when the company accepted all of its corporate powers subject to the reserved power of the state to modify its charter, and to impose additional burdens upon the enjoyment of its franchise. Under the act of March 15, 1884, it was made a condition of the enjoyment of its franchise by the company, that, when the city should determine that the streets should be paved, the company should bear a certain portion of the cost thereof: and any prior contract between the company and the city, in regard to paving, was subject to the provisions of section 1090 of the Code. There was nothing in the ordinance of December 12, 1883, which bound, or could bind, the city not to exercise its statutory authority to impose other conditions upon the exercises of the rights of the company. Our conclusion, therefore is that there was no contract between the company and the state or the city, the obligation of which was impaired by the laying of the tax in question. Judgment affirmed.

Street Railway—Obligation to Pave and Repair Street.—See Memphis, P. & B. R. Co. v. State (Tenn.), 38 Am. & Eng. R. Cas. 429, note 433: Sioux City St. R. Co. v. Sioux City, 40 *Id.* 275; Carty v. City of London (Ont.), 43 *Id.* 279; Gilmore v. City of Utica (N. Y.), 43 *Id.* 225; State v. New Orleans City & L. R. Co. (La.), 43 *Id.* 276.

Same—Injury Caused by Hole in Pavement Under Rail—City Drain.—In Campbell v. Frankford & S. P. C. P. R. Co. (Pa., Jan. 26, 1891.) 21 Atl. Rep. 92, it was held that a street railway company, required to keep the pavement along its track in repair, is not responsible for a hole in the pavement under one rail of its track, made by direction of the city to serve as a drain, and maintained in the condition required by the city.

In this case it appeared that the only evidence of defendant's negligence in keeping the drain in repair is that a stringer under the rail had rotted, and that several accidents had happened there, and that the hole had been reduced in size by direction of the city. The court held that there is nothing to submit to the jury on that question.

WESTERN PAVING & SUPPLY CO.

v.

CITIZENS' STREET R. CO.

(*Indiana Supreme Court, January 10, 1891.*)

Street Railway—Amendment of Charter by City—Obligation to Pave.—A compliance by a street railway company with the conditions expressed in a city ordinance, to the effect that it should unite its two systems, construct new lines and reduce the fares, is a sufficient consideration to make valid an ordinance amending the charter of the company, by relieving it of the

obligation to pave the street between the rails of its track, and for a certain distance outside, and requiring it merely to keep such spaces in good repair. When such amended ordinance is accepted by the company and its conditions complied with, it becomes a binding contract.

Same—Charter Contract as to Paving—Amendment by City.—A city cannot, without the consent of the company, make a street railway company liable for grading improvements, where the company's charter, granted by the city, requires it only to keep the space between the rails of its track and for a certain distance outside in repair.

Same—Consideration of Granting Privileges—Parol Evidence.—A city ordinance granting to a street railway company the privileges and franchises belonging to a former company, constitutes a written contract between the city and such company, and it cannot, accordingly, be shown by parol that a part of the consideration of granting such privileges, was a promise by the new company to assume the burdens of an ordinance, not assented to by the former company.

Estoppel of Company to Deny Liability for Improvements—Acquiescence.—A street railway company is not estopped from denying its liability for the cost of street improvements by permitting them to be made without objection, where its charter compels it to repair, but not to improve, a certain portion of the street. And this is so, although the city council had by ordinance attempted to make the company liable for such improvements.

APPEAL from Marion County Circuit Court.

A. C. Harris and Linton Cox, for appellant.

H. C. Allen and Winter & Elam, for appellee.

COFFEY, J.—This case was under consideration by the late Judge MITCHELL, prior to his death, and, while so considering it, he prepared the following statement, which Case stated. we adopt: "On the 18th day of January, 1864, the common council of the city of Indianapolis passed an ordinance authorizing the Citizens' Street Railway Company, which had been duly organized under the general laws for the incorporation of street railways, to use the streets of the city for the purpose of constructing and operating thereon a street railway. Among other things, it was provided in the ordinance that the company should boulder that part of the street it might thereafter occupy lying between the rails of its track, and also that it should pave, boulder, or otherwise improve, and keep in repair, two feet on the outside of each rail, so as at all times to correspond with the street outside. Pursuant to the above ordinance the street railway system was in part constructed. Subsequently, in the month of April, 1878, the common council and board of aldermen amended so much of the ordinance of 1864 as imposed upon the company the duty of bouldering the part of the street between the rails of its track, and paving, or otherwise improving, as the street might be, a space outside of the track on either side, and, instead thereof, provided that 'the said company shall keep the tracks, and two feet on the outside of each rail, together with

all bridges and the crossings of all gutters, at all times, in good repair, to the satisfaction of the common council.' The company was required to signify its acceptance of the amendment within 30 days, and it is averred that the ordinance, as amended, was duly accepted. It appears that afterwards, in April, 1884, an ordinance was duly adopted, in which it was provided that, when any street upon which there existed a line of railway was improved from curb to curb, the improvement should be made under contract, as required by law, and that the street railway company should be liable to the contractor for its proportion of the total cost; the proportion to be determined by the city civil engineer according to the method prescribed in the ordinance. Nothing appears to indicate that the company accepted or consented to the provisions of this last ordinance. Subsequently, in 1888, the property and franchises of the corporation hereinbefore named were transferred to the Citizens' Street Railway Company, a new corporation then recently organized. The new company presented to the common council an ordinance known as the 'Ordinance of April 23, 1888,' which was duly adopted, and which is of the tenor following: 'Be it ordained by the common council and board of aldermen of the city of Indianapolis, that the sale and transfer heretofore made by the Citizens' Street Railway Company of Indianapolis, Indiana, of all its property, rights, franchises, and privileges in the city of Indianapolis to the Citizens' Street Railway Company, of the city of Indianapolis, its successors and assigns, subject to all the duties, conditions, and obligations heretofore imposed, and now resting on said railway company, be, and the same is hereby, ratified and approved; and all said rights, privileges, and franchises heretofore possessed by said old corporation are granted to, and confirmed in, said new corporation, its successors and assigns, subject to the same duties and obligations as rested on said old corporation.' In 1889, an ordinance was duly passed for the regrading of two squares of Pennsylvania street with asphalt. The contract was duly let to the Western Paving & Supply Company, and the work was done and accepted by the city, the amount estimated as the proportion to be paid by the company, according to the provisions of the ordinance of 1884, being \$3,716.28. The railway company denied its liability, whereupon the contractor instituted this suit to recover the amount. The central position which the street railway company plants itself upon, is that the ordinance passed by the common council of the city of Indianapolis in 1864, and the amendment thereto, adopted in 1878, both of which were duly accepted by its predecessor, had the force and effect of a contract which could not be

altered or impaired without its consent; that the old company had never consented to, nor accepted, the ordinance of 1884, which sought to impose upon it more extended obligations, and that by the ordinance of April 23, 1888, the new company became subject to the same duties and obligations that had theretofore been imposed upon the old, no greater and no less, and it was not bound by the ordinance passed in 1884, by which the obligation of paying a proportionate share of the cost of street improvements was sought to be imposed upon the old company."

The vital question to be decided by this court is this: Does the amendatory ordinance of April, 1878, providing that the Citizens' Street Railway Company should keep the space between its tracks and two feet on the outside of each rail, together with all bridges and crossings of gutters, at all times, in good repair, to the satisfaction of the common council and board of aldermen, and to cause the space between its tracks, and two feet on the outside of each rail, to conform to the grade of the street on which the same is laid, amount to a contract, based upon a sufficient consideration, the legal effect of which was to release the company from the performance of duties imposed by the ordinance of 1864, to which the appellee succeeded by its purchase from that company? Many of the questions governing the rights existing between street railway companies and the cities in which they operate their roads, under charters granted by such cities, seem to be too well settled to admit of longer controversy, while many other questions remain in doubt and uncertainty. It is settled that a charter granted by the common council to a street railway company to construct and operate a street railway within the corporate limits of a city, constitutes a contract between such railway company and the city. *City of Chicago v. Sheldon*, 9 Wall. (U. S.), 50; *Coast Line R. Co. v. City of Savannah*, 30 Fed. Rep. 646; *State v. Carrigan Consolidated St. R. Co.*, 85 Mo. 263; *District of Columbia v. Washington & G. R. Co.*, 4 Mackey (D. C.), 361, 4 Am. & Eng. R. Cas. 174; *Farrar v. City of St. Louis*, 80 Mo. 379; *New Orleans Gas Light Co. v. Louisiana Light, etc., Co.*, 115 U. S. 660, 10 Am. & Eng. Corp. Cas. 639; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 9 Am. & Eng. R. Cas. 526; *New Jersey v. Yard*, 95 U. S. 104. It is also settled that such charter is to be strictly construed against the railway company, and that it has no doubtful rights under such charter; for where there are doubts they are construed against the grantee, and in favor of the city. *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579; *Mayor, etc., of Allegheny v.*

Question presented.

Charters of street railway companies.

Ohio & M. R. Co., 26 Pa. St. 355; Birmingham & P. M. St. R. Co. v. Birmingham St. R. Co., 79 Ala. 465; Railway Co. v. City of Philadelphia, 10 Phila. (Pa.), 70. It seems to be set-

**Duty of com-
pany to repair
streets.**

tled that a street railway company is bound to keep in repair that portion of the street used by it, even in the absence of a stipulation in its charter requiring it to do so; but the question as to whether it is compelled to improve the street, as ordered by the city, in the absence of a contract to that effect, seems to be in some doubt. It is undoubtedly true that the authorities upon this question are conflicting. Judge ELLIOTT, in his valuable work on Roads and Streets, after a careful examination of the authorities upon the subject, at page 594, says: "As much as can be safely affirmed in the present state of the decided cases is that the private corporation is bound to repair, but is not bound to improve. It is bound to restore, but is not bound to change. * * *

It would not, as we interpret the rule sustained by the weight of authority, be compelled to make a new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them correspond to the new pavement." The conclusion reached by Judge ELLIOTT, as stated above, is fully warranted by the authorities cited in support of the text. By section 5 of the original charter granted to the Citizens' Street Railway Company, and accepted by it, that company contracted with the city of Indianapolis to boulder the streets between rails and to pave or otherwise improve, the street for a given space outside its rails. If this section were still in force the case

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company.**

would, we think, be free from difficulty. But, if the amendment of 1878 was a valid and binding ordinance, and was accepted by the company, section 5 of the original charter does not now exist, being merged in the amended section. It is to be inferred from the amendment above referred to, that the company, under the original charter, had constructed in the city, two systems of railway; one south of the Union Railway tracks, and one north, which were wholly disconnected. The city was desirous of having these two systems connected, and of limiting the fare to be charged for the transportation of passengers to any part of the city to five cents; and, also, that the company should construct, within a given time, certain additional lines of railway named in the ordinance. It is recited in the amended ordinance, that it is passed by the common council and board of aldermen in consideration that the company will comply with the desire of the city as above expressed. A compliance by the company with the conditions expressed in the ordinance was, we think, a sufficient consideration for

the amended ordinance, and when it was accepted by the company, and its conditions complied with, it became a binding contract. The amount of the consideration was a question to be settled by the contracting parties, and is a matter over which the courts, in the absence of fraud, have no control. This amended section 5 provides, as we have seen, that the company shall keep the space between its rails, and two feet on the outside of each rail, together with all bridges at the crossing of gutters, at all times, in good repair, and omits the provisions contained in the original charter, that the company should boulder the space between the rails of the track and pave, or otherwise improve, (as the street may be,) two feet on the outside of each rail. The contract then made between the city and the company, in 1878, was a contract to repair, and not a contract to improve, the streets upon which the railway was then, or should thereafter be laid.

The question, therefore, arises whether the city of Indianapolis possessed the power to pass a binding ordinance in the year 1884, requiring the street railway company to pay for improving the streets occupied by its street railway. The question here presented seems to have been carefully considered, not only by some of the state courts, but by the supreme court of the United States. In the case of *Coast Line R. Co. v. City of Savannah*, 30 Fed. Rep. 646, the question involved was similar to the one now before us. In that case the city of Savannah had granted to the Coast Line Railroad Company the right to lay a track upon a certain street in the city, on conditions prescribed in the ordinance, one of which was as follows: "In the event of paving by the city of the whole or any part of the streets used by said railroad company, the portion of the track between the rails shall be paved, and kept in good order and thorough repair, by the company at its own expense and cost." The ordinance was accepted by the company. The legislature of the state authorized the mayor and aldermen of the city to pave the streets, and by § 2 of the act granting such authority, it was provided that any street railroad company having tracks running through the streets of the city should be required to macadamize, or otherwise pave, as the mayor and aldermen should direct, the width of its tracks and three feet on each side of every line of track then in use, or that might thereafter be constructed by such company. Pursuant to the statute, the city passed an ordinance to pave Broughton street, upon which the company had a track, with asphalt, and directed the company to pave not only between its rails, but for three feet on

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each side of the rails, and the company refusing to pave otherwise than between its tracks, the city laid the additional pavement, and levied upon the property of the company for payment of the expense. The company brought suit for an injunction, upon the ground that the act of the legislature, under which the city acted, was in violation of the constitution of the United States, as it impaired the obligation of the contract embodied in the ordinance, by which the company had been granted the right to occupy the streets. It was held, by the court, that the provisions of the ordinance requiring the company to pave, and keep in good and thorough repair, the portion of the street between the rails of its track, was the limit of the paving to be done by the company; and that the obligation to do this amount of paving was as binding on the city as it was upon the company; and that the act of the legislature, above referred to, impaired the obligation of this contract, and under the provisions of § 10, art. 1, of the constitution of the United States, was void. In the case of *State v. Corrigan Consolidated St. R. Co.*, 85 Mo. 263, the ordinance which conferred upon the company the right and privilege of using the streets of the city for a horse railway, contained a provision which required the railway company to keep and maintain the space between its rails, and for two feet on either side of its track, and all street crossings along its line, in good repair. It was held that under such ordinance, the company could not be compelled to reconstruct the street; that the obligation to repair a street is not an obligation to construct thereon a new pavement. It was further held that the city could not, by a subsequent ordinance, impose on the company, without its consent, the additional obligation to pave the street; and that a subsequent ordinance attempting to impose such additional burden, could not be sustained on the ground that it was the proper exercise of the police power of the city. In the case of *Chicago v. Sheldon*, 9 Wall. (U. S.), 50, the city of Chicago, by proper ordinance, granted to the North Chicago City Railway Company a charter to construct its railway upon certain streets in the city of Chicago, which charter contained the following provision: "The said company shall, as respects the grading, paving, macadamizing, filling, or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them, keep 8 feet in width along the line of said railway on all the streets wherever one track is constructed, and 16 feet in width along the line of said railway where two tracks are constructed, in good repair and condition, during all the time to which the privileges hereby granted to said company shall extend, in

accordance with whatever order or regulation, respecting the ordinary repairs thereof, may be adopted by the common council of said city." It was held by the supreme court of the United States, the court of last resort, upon questions of the kind we are now considering, that under this charter the company could not be held liable for improvements made on the streets occupied by its railway, and that its obligation could only be extended to the duty of repairing the streets after they had been improved by the city. In the case of *State v. Corrigan Consolidated St. R. Co.*, *supra*, the court, in speaking of the distinction between constructing a street, and keeping the same in repair, says: "The obligation to repair a street is one thing, and the obligation to construct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation, or partial injury. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house, could not be required to tear it down and rebuild it." Following these authorities, we are constrained to hold that the appellee Citizens' Street Railway Company, under the amended charter of 1878, could not have been compelled to pay assessments for street improvements. Without torturing the language used, and holding that the words "repair," "construct," and "rebuild" are synonymous, and thus putting ourselves in conflict with all the authorities upon the subject, we cannot reach the conclusion that the appellee, which succeeded to the rights of the Citizens' Street Railway Company, is liable, under this charter, to be assessed for the expense of paving or repaving the streets of the city of Indianapolis. The conclusion here reached is not in conflict with the case of *Pennsylvania R. Co. v. Miller*, 132 U. S. 75. In that case, the company obtained its charter from the state, at a time when such corporations, under the constitution of the state, were liable for property actually taken in the construction of their railways, but were not liable for consequential damages. Subsequently, the constitution of the state was so amended as to render such corporations liable for consequential damages. It was held that the company had no such contract with the state of Pennsylvania as exempted it from the operation of this constitutional amendment; that it took its charter subject to the general laws of the state, and subject to such changes as might be made therein, and to such changes as might be made in the provision of the constitution. It seems plain to us that there is a broad distinction between the principle announced in that case and the case before us, where the appellee has an express contract limiting its liability to the expense of keeping that

part of the streets used by it in repair, and exempting it from the burden of improving the streets. That such a contract as the one before us is binding on the city is abundantly established by the authorities above cited.

In the second paragraph of the complaint, the appellant alleged, substantially, that the ordinance of 1888, above set out, was presented to the common council and board of aldermen of the city of Indianapolis, and while the same was under consideration, in order to induce the city to accept and pass the same, and as the consideration moving from the appellee to the city therefor, the appellee then and there promised and agreed with the city that if it would pass the ordinance as presented, the appellee would accept, and did then and there accept, and become bound by the ordinance of 1884 above referred to; and that, in consideration of said promise, acceptance, and agreement, the council and board of aldermen did then and there pass the ordinance, and upon no other consideration. Substantially the same allegations are contained in the first paragraph of the complaint, except that in this paragraph it is alleged that the appellee, to induce the city to accept and pass the ordinance of 1888, represented to the city that, by the terms of said ordinance, it was bound to comply with the ordinance of 1884, and that the city acted upon this representation and construction and passed the same. These allegations, on motion of the appellee, were struck out by the court, and this ruling is assigned as error. As we have seen, the ordinance of 1888, as well as all other ordinances granting rights to the company, constitutes a contract between the city and the company. There is no disagreement among counsel as to the general rule that parol evidence will not be received to vary, contradict, add to, or to subtract from the terms of a written contract. Nor is it controverted that the ordinance of 1888 constitutes a written contract between the city and the appellee. The controversy relates to exceptions to the general rule, and as to whether the case before us falls within any of the exceptions. It is substantially agreed that one of the exceptions to the general rule is that found in Steph. Dig. Ev. art. 90, p. 128, namely, that where the existence of any separate oral agreement is alleged as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole transaction between them, such oral agreement may be proven. It is affirmed by the appellant that the case before us falls within this exception, while the appellee

Parol evidence to vary contract.

denies it. In the case of *Welz v. Rhodius*, 87 Ind. 1, the question now under consideration was very fully considered. The doctrine as announced in that case, however, has been so far modified by later decisions of this court that it is not now, upon the subject we are considering, to be regarded as unquestioned authority. *Singer Manuf. Co. v. Forsythe*, 108 Ind. 334; *Diven v. Johnson*, 117 Ind. 512; *Conant v. National St. Bank*, 121 Ind. 323; *Carr v. Hays*, 110 Ind. 408. In the case of *Conant v. National St. Bank*, *supra*, it was said by this court: "It is true that the actual consideration of a contract may be shown by parol evidence, but it is not true that when the acts that a party agrees to perform are expressly and specifically set forth, it may be shown by parol evidence that he agreed to do other things. Where the writing states specifically the acts which the parties are to perform, no other acts can be proven by parol, except in cases of fraud or mistake." So in the case of *Pickett v. Green*, 120 Ind. 584, it was decided that, where the contract is complete upon its face, a stipulation as to the consideration becomes contractual, and that where there is an express and positive promise to pay a stipulated consideration, the general rule applies, and the consideration expressed, can no more be varied by parol, than any other part of the contract. See, also, *Reisterer v. Carpenter*, 24 Ind. 30. These authorities must now be considered as the law in this state, and in so far as they conflict with the case of *Welz v. Rhodius*, *supra*, that case must be regarded as overruled.

The action of the circuit court in striking out the allegations above referred to, judged by these cases, was not erroneous. The city of Indianapolis, by the ordinance of 1888, granted to the appellee all the rights, privileges, and franchises before that time possessed by the Citizens' Street Railway Company, and, in consideration of such grant, the appellee assumed all the obligations and duties resting upon that company. If the Citizens' Street Railway Company was not bound by the ordinance of 1884, it imposed no duty upon it, and to permit the appellant to allege and prove by parol, that the appellee assumed the burdens imposed by that ordinance, would be to permit it to prove that the appellee agreed to do something in addition to what is expressed in the contract as an additional consideration for the ordinance of 1888. As we have seen, this cannot be permitted.

Finally, it is contended by the appellant that the appellee is estopped from denying the validity of the assessment for the collection of which this suit is prosecuted, by reason of standing by and making no objection to the improvement until the same was completed. It has often been held by this

court that where the owner of property liable to assessment for street improvements stands by and makes no objection to improvements which benefit his property, he is estopped from denying the authority by which such improvements were made, and will be held to pay assessments made in aid of the improvement. *City of Lafayette v. Fowler*, 34 Ind. 141; *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *Palmer v. Stumpf*, 29 Ind. 329; *Martindale v. Palmer*, 52 Ind. 411. Where a railroad company is liable to be assessed for such improvements, it will likewise be estopped if it stand by and see the improvements made without objection. *City of New Haven v. Hartford, P. & F. R. Co.*, 38 Conn. 423. We have no doubt that such is the law in all cases where the owner of property liable to be assessed stands by, and without objection sees improvements made which benefit his property. The doctrine announced in the cases cited, as stated therein, rests, in a measure, upon statutory provisions, to the effect that no inquiry shall be made into questions of facts arising prior to the time the contract is entered into for the improvement, it being held that the property owner, after allowing the improvement to proceed, without objection, should be held to have waived all irregularities, if any occurred, in the manner of ordering the improvement and letting the contract. Independent of the statutes upon the subject, it is probably true that a property owner whose property is subject to assessment for street improvement, who sees improvements made which benefit his property, upon the faith that his property shall bear a part of the expense, and does not object to such improvement, would be estopped, upon equitable grounds, from denying his liability. In this case, however, the property of the appellee, as we have seen, was not subject to assessment for street improvements. The city had the right to make the improvement described in the complaint, and the appellant had no right to object thereto. It was its duty to adjust its track in such a manner as to conform to the street in its improved condition. It does not appear that the appellee omitted to do anything which it had the right, or which was its duty to do, or that it did anything which it was not in duty bound to perform. Such a case, we do not think, falls within the authorities above cited. In our opinion the appellee is not estopped from denying its liability for the assessment sought to be recovered in this case. Impressed with the importance of the questions involved in this case, we have given them each a careful and laborious consideration, and feel warranted in saying that there is no error in the record for which the judgment should be reversed.

City not estopped from denying liability.

ELLIOTT, J., took no part in the consideration of this case.

Duty of Street Railway Company to Pave and Repair Street.—See *ante* Sioux City St. R. Co. v. Sioux City, and note pp. 169, 176.

SHENNERS

v.

WEST SIDE STREET R. CO.

(*Wisconsin Supreme Court, December 16, 1890.*)

Street Railway—Injury to Child on Track—Special Findings.—The plaintiff sued for the death of her infant child, who was run over by one of the cars of the defendant street railway company. The jury found specially, taking into account all the circumstances of the case, that the death of the child resulted from the negligence of defendant's driver in charge of the car when the accident occurred. The jury also found specially, that at the time the driver first saw the child or could have seen him, in the exercise of proper care, the car was about 90 feet distant: that the child then ran suddenly towards the car, and got between the horses and the car before he could be prevented or the car stopped; and that the driver did not have any reason to expect that the child would undertake to cross the track. *Held*, that the findings supported a judgment for the plaintiff, and that it was not error to deny defendant's motion for judgment upon the special verdict.

APPEAL from Circuit Court, Milwaukee County.

Clybourn street, in Milwaukee, runs east and west, and crosses Clermont street at right angles. The complaint alleges, in effect, that the plaintiff was a resident of Milwaukee, and three years of age; that the guardian was appointed October 3, 1888, as stated; that the defendant was a corporation, created and existing under, and by virtue of, the laws of this state, and the ordinances of said city, and engaged in operating and running street cars, propelled by horses, for the purpose of carrying passengers, for hire, upon and over said Clybourn and other streets of said city; that, August 19, 1888, a certain car of the defendant, propelled by horses, was, by its servant being driven upon said Clybourn street while said plaintiff was lawfully crossing on the east side of said Clermont street, and the defendant, by its servant, so negligently drove and conducted said street car that, thereby, the same ran and was driven against the plaintiff, and seriously and permanently injured him, to his damage in a sum named: that said Clybourn street, and other streets, upon which the defendant was so operating its street railway, were public highways and thoroughfares, over which great

numbers of citizens of said city were constantly passing and repassing; that in addition to the negligence mentioned, and for more than six months immediately prior to August 19, 1888, the defendant negligently and unlawfully suffered and permitted that portion of said Clybourn street, at the crossing at the intersection of the same and Clermont street, to be and remain out of order and insufficient, by suffering and permitting that portion of Clybourn street, at said crossing, lying between the outside rails of said tracks, to be and remain below the grade of the surface of the balance of said street, and below the top of said rails upon said track, the distance of six to eight inches; that the defendant carelessly and negligently permitted said car to get out of repair, so that the brakes, and other appliances thereon, were and had become out of repair, worn, broken, and unserviceable, so that they would not stop the said car with reasonable certainty or dispatch, or within a proper and reasonable distance, yet that the defendant carelessly and negligently used and operated the same, as aforesaid, and the defendant's servants so negligently drove and conducted said unsafe, dangerous, and unserviceable car, that thereby the same ran and was driven against the plaintiff, and seriously injured him, as aforesaid, whereby he was permanently disabled, losing his right foot entirely, and partly the use of his left foot, besides other great and serious bodily injuries, to his damage in the amount stated. The answer denied all negligence on the part of the defendant, and alleged contributory negligence. At the close of the trial, and under the charge of the court, the jury returned a special verdict to the effect: (1) The plaintiff's injuries, of which he complains in this action, were the result of the negligence of the defendant's driver, who had charge of the car by which the injuries were caused, taking into account the condition of the street, the extent to which it was used, the steepness of the grade, and all the facts and circumstances of the case, bearing upon the question. (2) The parents of the plaintiff were not guilty of negligence in leaving him with their daughter Jane. (3) The said daughter Jane was not guilty of negligence in suffering the plaintiff to go abroad with her younger sister. (4) Said younger sister was not guilty of negligence in leaving the plaintiff with his cousin, as she did. (5) Should the court be of the opinion that the plaintiff is entitled to judgment, we assess his damages at \$8,000. (6) The driver of the defendant's car was not driving the horses at an ordinary, usual, and moderate rate of speed, before and at the time of the accident. (7) At the time the driver first saw the child, or could have seen him, in the exercise of proper care, the car

was about 90 feet west of the plaintiff, at the east crossing. (8) The child suddenly started from the place where he was first seen by the driver, and ran towards the horses and the car. (9) The child ran between the horses and the defendant's car before he could be prevented, and before the car could be stopped. (10) The driver of the street car did not have any reason to expect that the child would undertake to cross the street at the time. (11) The defendant company was not guilty of any other want of ordinary care which caused the injury, except the negligence of the driver. Thereupon the plaintiff moved for judgment in his favor and against the defendant, upon the special verdict rendered by the jury; and the defendant moved for judgment in its favor upon the record, pleadings, and the special verdict rendered by the jury. The court overruled and denied the defendant's motion, and ordered that the plaintiff have judgment against the defendant upon said special verdict, upon condition that within five days from the date thereof the plaintiff should remit, from the damages assessed and found by the jury, the sum of \$3,000, and, in case the plaintiff failed so to do, then that said verdict be set aside, and a new trial granted, but that, if the plaintiff filed such remittance, then he was to have judgment against the defendant for the sum of \$5,000 damages. The plaintiff's attorneys thereupon did remit from said verdict said sum of \$3,000, and consented to take judgment for the sum of \$5,000, and thereupon the court ordered judgment to be entered against the defendant, and in favor of the plaintiff, for that amount, with costs taxed at \$246.83. From the judgment entered thereon accordingly, the defendant brings this appeal.

Burton Hanson and Danforth Becker, for appellant.

Rose & Bell, for respondent.

CASSODAY, J.—The only error assigned is the granting of the plaintiff's motion for judgment upon the special verdict, and in denying that of the defendant. The effect of the pleadings, and the substance of the several findings in the special verdict, with their respective numbers, are given in the foregoing statement. The second, third, and fourth findings negative the alleged contributory negligence of the plaintiff, and are not questioned. The fifth finding assessed the plaintiff's damages, and, as subsequently reduced, is not questioned. The other findings all relate to the alleged negligence of the defendant. The real question is whether it appears from those findings, when taken together, that the injury was caused by the defendant's negligence. We fully agree with the learned counsel for the de-

Question at issue.

defendant in saying that "the question arising on this appeal is whether the special verdict entitles the plaintiff to a judgment. If not, then the defendant should have judgment.

Findings of special verdict.

In determining this question, the same presumption will follow each special finding which would attach to a general verdict; that is, the fact found therein is presumed to have been supported by a preponderance of evidence, and to have been established to the satisfaction of the jury. Each finding of the special verdict will control, as to the particular fact found therein, as against any other finding upon other issues, the same as it would control in case of inconsistency with a general verdict." A verdict is a declaration of the truth as to the matters of fact submitted to the jury. This is true of a special verdict as well as a general verdict. However many separate questions a special verdict may determine, it is nevertheless returned as a whole, and as such, is a unit. *Ryan v. Rockford Ins. Co.*, 77 Wis. 611; *Treat v. Hiles*, 75 Wis. 265. Of course, two separate findings in conflict with each other, substantially upon the same specific fact, would nullify each other; so the finding of a specific fact, inconsistent with a more general finding upon the same subject, will, to the extent of such specific fact, cut down and limit such more general finding. In other words, some findings may be very broad and comprehensive, while others may be very narrow and specific, and hence of minor importance.

In the case at bar the first finding is very broad and comprehensive and covers every phase of the driver's negligence taking into account the condition of the street, the extent to which it was used, the steepness of the grade, and all the facts and circumstances of the case bearing upon the question. In the language of counsel, above quoted, the fact therein found "is presumed to have been supported by a preponderance of evidence, and to have been established to the satisfaction of the jury." Among the facts thus presumed to have been established by the evidence, were the condition of Clybourn and Clermont streets being out of grade with the railway track at the crossing in question; the extent to which those streets, as public highways and thoroughfares, were used by citizens passing and repassing; the steepness of the grade, and whether the condition of the car prevented its being stopped with reasonable certainty or dispatch, or within a proper and reasonable distance, as alleged and indicated in the foregoing statement. As indicated, the real question is how much is to be eliminated from that general finding by other specific findings bearing upon the question of the defendant's negli-

Effect of general finding.

gence; and whether, after such eliminations there is still enough left to support the judgment.

The sixth finding is a negative. It is simply to the effect that the car was not being driven at an ordinary, usual and moderate rate of speed before and at the time of the accident. That would be equally true, if it were then being driven up a steep grade excessively slow, or, as the inferences seem to be, down a steep grade excessively fast. That finding, therefore, in no way militates against the first finding, but inferentially supports it.

Special find-
ings not in-
consistent
with verdict.

The seventh finding is to the effect that at the time the driver first saw the child, "or could have seen him, in the exercise of proper care," the car was about 90 feet west of the plaintiff at the east crossing. This does not determine whether the driver in fact saw the child, but simply that, when the car was 90 feet west of the plaintiff at the east crossing, he did see him, or could, if he had been in the exercise of ordinary care. Nor does it determine the location of the child at the time, except that he was at the east crossing. That finding would be equally true if the child was, at the time, at the outside edge of Clybourn street, or within two or three feet of the railway track, or at some point between. Nor does it determine whether the child was, at the time, standing or walking, nor, if walking, which way he was walking. All of those things must have been made plain to the jury by the evidence; and we may fairly assume that they were fully considered by them in answer to the first question submitted. The sole purpose of the seventh question was to have the jury determine the distance the car was from the child, when he came within the driver's range of vision, had he been in the exercise of ordinary care in keeping a lookout. Having determined that the child was within such range of vision, when the car was 90 feet from him, it may fairly be presumed that he continued within such range of vision during the whole of the time the car was passing over that distance; so that, for the whole of that distance, the driver could have seen the child, had he kept a vigilant lookout.

The eighth finding is to the effect that the child suddenly started from the place where he was first seen by the driver, and ran towards the horses and the car. As indicated, the jury nowhere found that the driver actually saw the child when the car was 90 feet from him, but simply that at that time he either did see him or could have seen him. If he did see him at that time, and at or near the edge of Clybourn street, and then, or soon after, saw him suddenly start and

run towards the track, then the jury were justified in finding that the driver was negligent in not stopping before the child reached the track. If, on the contrary, the driver did not see the child at all until the horses were within a few feet of him, then the jury were justified in finding that the driver was negligent in not seeing the child when he could have seen him by keeping a lookout. *Heddles v. Chicago & N. W. R. Co.*, 74 Wis. 239, 39 Am. & Eng. R. Cas. 645. Had the jury found that the driver actually saw the child standing in charge of some one within a few feet of the track at the east crossing, when the car was 90 feet distant, and that the child and the person in charge continued to stand there until the horses had nearly passed him, and then suddenly ran in behind the horses, there would have been great force in the argument that there was an absence of negligence on the part of the defendant, or the presence of contributory negligence on the part of the person so in charge. But there is no such finding.

It is true the ninth finding is to the effect that the child ran between the horses and the car before he could be prevented, and before the car could be stopped. But, as indicated, the driver may have negligently failed to see the child until he got within a few feet of the track and the car, and when it was too late to prevent his going further, or to stop the car before it struck him.

True, the tenth finding is to the effect that the driver did not have any reason to expect that the child would undertake to cross the street at the time. That would be equally true, if the driver negligently failed to see the child until he got within a few feet of the track and the car, or if he saw him at the edge of Clybourn street, when the car was 90 feet distant, and then carelessly or negligently failed to observe him further, or keep any lookout for him until he got within a few feet of the track and the car, and when it was too late to prevent his going further, or to stop the car before it struck him.

True, the eleventh finding is to the effect that the defendant was not guilty of any other want of ordinary care which caused the injury, except the negligence of the driver. But the ordinary care required of the driver must, after all, be determined by the circumstances which accompanied the transaction. His vigilance was required to be commensurate with his reasons for apprehending danger. Hence the jury were bound to take into account the condition of the track, the number of citizens which was constantly, or ordinarily, passing and repassing on these public streets, the steepness of the grade, the facility, or want of facility, for

suddenly stopping the car, the character and disposition of the horses, and, in fact, all the circumstances, in order to intelligently determine what kind of speed would be careless or reckless driving, or what want of care in keeping a lookout, or want of vigilance in stopping the car in the presence of reasonably apprehended danger, would be negligence. The car moved and the child moved, and the circumstances necessarily kept shifting and changing as they approached each other, and hence the case was peculiarly for the jury.

The special findings must necessarily be considered and construed with reference to such shifting and changing circumstances. So considered and construed, we must hold that the negligence found in the first finding, is not wholly eliminated by any or all the other special findings. This ruling is not, as we understand, in conflict with any of the adjudications of this court. While we may differ with the learned counsel for the defendant as to the significance of some of those cases, yet our principal difference here is as to the construction and effect of the special findings in the case at bar. The judgment of the circuit court is affirmed.

Injury to Persons upon the Track of a Street Railway Company.

Boy Falling Down on Track in Attempting to Cross and Run Over—Accidental Injuries.—In *Dorman v. Broadway R. Co.*, 117 N. Y. 655, the action was brought for the alleged negligent killing of a boy who was run over by one of defendant's cars. Upon the trial, it appeared from the evidence that the boy attempted to cross the track in front of the car, while the same was moving, and that when about two feet distant from the horses he fell upon the track and was run over. There was a conflict in the evidence as to how far deceased was in front of the horses when he first started to cross. It was shown that the distance from the horses' heads to the front wheel of the car was about 19 feet, and there was evidence that the car could have been stopped within the distance of from 15 to 18 feet. The driver testified that he was standing in position against the dashboard with one hand upon the brake, and with the reins in the other, and was looking for crossers, but on account of the darkness did not see the boy. He said that he put on the brakes so suddenly that the car was stopped with a jerk. He also testified that he could not stop the car as quickly as he might otherwise, because the horses jumped over the boy, jerking the car ahead, and also, because when the boy fell he rolled over towards the car in his struggles to extricate himself. *Held*, that there was no evidence that the boy came to his death from any fault or carelessness attributable to the defendant; that his death was due solely to his accidental falling upon the track, and that a judgment for the plaintiff should be reversed.

In *Fenton v. Second Ave. R. Co.* (New York Ct. of App., March 10, 1891,) 26 N. E. Rep. 967, the action was brought to recover damages for the death of plaintiff's son, who was run over and killed by one of defendant's street cars. It appeared that the boy fell down while attempting to cross the track in front of a moving car. At the time he fell the car was not more than 20 feet distant. The place was not a crossing, and the driver applied the brake as soon as the boy fell. *Held*, that the defendant was not responsible for the accident. *EARL, J.*, said: "If it be assumed

that the boy fell twenty feet in front of the horses, as testified to by one of the plaintiff's witnesses, then the horses going at the usual rate of speed, assuming it to be six miles an hour, would have reached him in above two seconds, and that was all the time the drivers had to see the peril, apply the brake, and arrest the motion of the car before reaching him, and there is no evidence that, by the exercise of all the vigilance that the law requires of drivers under such circumstances, they could, after the boy had fallen upon the track, have arrested the car in time to save him from injury. If it be assumed that they saw him as he approached the track, they had the same reason to suppose that he would get across that he had; and he probably would have crossed in front of the horses in safety if he had not fallen. No negligence can be attributed to the drivers because they did not apply the brake before the boy fell, because then, for the first time, the peril commenced and became apparent. This accident did not happen at a street crossing, but between the upper and lower crossings of the street, and hence the drivers did not have the same reason to expect any one there as at a street crossing. There was nothing requiring this boy to run across the track at this particular place and time. If he had walked, he probably would not have fallen, and if he had waited two or three seconds the car would have passed, and he could then have gone over the street in safety. Street railway cars have a preference in the streets, and while they must be managed with care, so as not to carelessly injure persons in the street, pedestrians must, nevertheless, use reasonable care to keep out of their way. The unfortunate death of this boy was due to his own carelessness, or it was a pure accident, and in either event the defendant cannot be held responsible for it. The judgment should be reversed, and a new trial granted, costs to abide the event."

In *Manahan v. Steinway & H. P. R. Co.* (New York Ct. of App., Feb. 24, 1891,) 26 N. E. Rep. 736, the action was brought to recover damages for personal injuries to a boy twelve years of age, injured by being run over by defendant's street car. The boy testified that he attempted to cross the track in front of defendant's car; that he saw the car coming but thought he would have time to get across. The only suggestion of negligence on the part of defendant was plaintiff's claim that the driver of the car accelerated its speed just as the boy was crossing. *Held*, that the evidence failed to show a case against the defendant.

Creeping Child on Track Run Over and Killed—Sufficiency of Allegations of Negligence.—In *San Antonio St. R. Co. v. Caillonette* (Tex. Sup. Ct., Jan. 26, 1891,) 15 S. W. Rep. 390, the action was brought to recover damages for the death of plaintiff's child, an infant fourteen months old, who had, without plaintiff's knowledge or negligence, as alleged, gone into the street to play. The petition alleged, that as the child was in the act of crossing the track, defendant's car driven by its employe at a rapid gait ran over the infant and killed it. It was alleged that the road was unobstructed in front of the car and that the driver acted "without proper regard, imprudently, carelessly, heedlessly, and negligently" and thereby caused its death. It was *held*, that the petition alleged facts constituting negligence and that it was not necessary to allege that such facts did constitute negligence if the conclusion of negligence could properly be drawn from them.

Negligence of Driver, Warned by Passenger, in Running Over Child.—In an action for the death of an infant, killed by being run over by a street car, one of the passengers upon the car at the time the injury occurred testified that the car was moving rapidly and that the driver was urging his mule; that witness saw the infant standing near his mother's door suddenly commence to crawl rapidly towards the track; that the child was not seen by the driver who continued to urge his mule; that witness called to the driver to look out for the child, but that the driver did not heed;

that he warned the driver a second time, when the brakes were applied, but too late to avoid the accident. *Held*, that an instruction to find for defendant was properly refused. *San Antonio St. R. Co. v. Caillouette* (Texas Sup. Ct., Jan. 26, 1891,) 15 S. W. Rep. 390.

Person Run Over While Walking on the Track—Contributory Negligence—Failure to Look for Car.—In *Warner v. People's St. R. Co. of Luzerne County*, (Pa., April 20, 1891), 21 Atl. Rep. 737, it appeared that plaintiff while attempting to pass through a cut in a snowdrift on defendant's track, was overtaken by a horse car which she endeavored to avoid by stepping to one side. She was knocked down by the body of the car and injured. Plaintiff could have seen the car for a quarter of a mile when she got upon the track, and the bells could have been heard at a distance of 40 rods. Plaintiff did not notice the car until it was nearly upon her. *Held*, that she was not entitled to recover. MITCHELL, J., said: "The place of the accident was in the public road, where both parties had a right to be, and where each, therefore, was bound to be on the lookout for the other. *Schmidt v. McGill*, 120 Pa. St. 405. But the right of the defendant's cars was superior. They were confined to the track, and on that they had the right of way, to which the use by other parties, on foot or otherwise, was of necessity subordinate. The plaintiff, on the other hand, could use the whole road, and which part of it she took was merely a matter of convenience. That defendant in clearing its track from snow for the passage of its cars had made it also more convenient for plaintiff to walk on, could not be turned to its disadvantage, or enlarge the plaintiff's rights over that part of the public road. They were still subordinate to defendant's right of way. *Jatho v. Green & C. St. R. Co.*, 4 Phila. (Pa.) 24; *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504; *Adolph v. Central Park, N. & E. R. R. Co.*, 76 N. Y. 530. These being the respective rights of the parties, the plaintiff came to a point on the road where the defendant's track ran through a snowdrift for a distance estimated by plaintiff herself at half a block, where the snow had been removed from the track, leaving a passage just wide enough for the cars, with vertical walls of snow two or two and a half feet in height. It was plainly a place of danger for a foot passenger in case a car should reach it, and therefore a place for unusual caution and vigilance. But the rest of the road was, as plaintiff testified, ankle deep in snow and slush, and plaintiff took the more dangerous, but more comfortable, way. She says she looked just before she went into the cut, to see if there was a car behind her, and saw none. But on this, the pivotal point of the case, the uncontradicted evidence is overwhelmingly against her. The drift was at the top of a hill or rise, from which there was an unobstructed view in the direction from which the car was coming, fixed by plaintiff's own witnesses at quarter to half a mile, and up this hill the car came at a moderate speed, with bells that could be heard for 40 rods. Yet plaintiff herself says she had got but a little way into the passage before the car came upon her. It is unquestionable that the car must have been plainly in sight at the time she entered this dangerous path, and if she looked at all it must have been a mere heedless glance, which all the evidence shows was not an adequate performance of the duty the situation required. The case belongs clearly to the class of *Carroll v. Railroad Co.*, 12 W. N. C. (Pa.) 348, and required the court to pronounce plaintiff negligent as matter of law."

THOMAS

v.

CITIZENS' PASSENGER R. CO.

(132 Pa. St. 504.)

Street Railway—Collision of Car with Carriage—Negligence of Driver—Question for Jury.—Plaintiff sued for damages resulting from the collision of a street car with her carriage, while she was attempting to cross the track, in front of the approaching car. It was shown that the driver of the car was, at the time, looking up and down the street to see if any passengers desired to board the car. But it also appeared that his attention was not unnecessarily, or for any unreasonable time withdrawn from a view of the track. There was no evidence that he neglected to apply the brakes promptly, or that he failed to do anything which he might have done to avoid a collision. *Held*, that it was error to submit the question of such driver's negligence to the jury.

Same—Duty of Person in Carriage with Curtains Drawn to Look.—The fact that the curtains of a carriage with which a street car collided were drawn, will not excuse the occupant of such carriage from the duty of looking for an approaching street car, before attempting to cross the track, especially as such occupant heard the bells of an approaching car.

Same—Opinion Evidence as to Whether Driver Might Have Avoided Collision.—In such a case, the opinions of witnesses having no knowledge or experience in the handling of cars, or in the operation of brakes, as to whether or not the driver might or might not have stopped the car in time, upon a descending grade, to have avoided the collision, are of little importance.

Same—Burden of Proof.—In an action against a street railway company to recover damages on account of a collision of plaintiff's carriage with defendant's street car, plaintiff has the burden of proving the negligence of the defendant, and her own want of contributory negligence.

ERROR to Montgomery County Court of Common Pleas.

The plaintiff, Helen L. Thomas, while driving across the track of the defendant company, was injured by a collision of her carriage with one of defendant's cars. The jury returned a verdict for the plaintiff. Defendant brings error from a judgment overruling a motion for a new trial.

Joseph Fornance and Irving P. Wanger, for plaintiff in error.

N. H. Larzelere and M. M. Gibson, for defendant in error.

CLARK, J.—The plaintiff in this case, Helen L. Thomas, concedes that if the conductor or driver of this car could not have stopped it in time to avert the accident he was guilty of no negligence; but her contention is that if he could have done so, and did not, he was negligent, and she is entitled to recover. The only negligent act complained of, therefore, is that the conductor

Evidence to
show driver's
negligence.

did not stop the car before the collision occurred. The plaintiff testifies that she was going down Main street on one side of the track, and that her intention was to cross the track, and go up the same street on the other side. In doing this she would necessarily be obliged to pass on, over, and off the track in the form of a semi-circle. The driver might well have supposed, in the first instance, that she was merely turning on the track in front of him. He could only discover her full intention when she had gone far enough to indicate her purpose to cross over. She says that at the time she undertook to cross the car was 30 feet or more distant from her, and she thought there was time to cross. Mr. Wilson, the plaintiff's witness, says he was standing at the corner of Main and De Kalb streets; that just as the plaintiff's horse was about to step on the track he saw the car; that the conductor was at the moment looking down De Kalb street, presumably for passengers; and that he called to him, "Hold on, or you will run into that lady's carriage." Whether the driver heard him or not he does not know. The car was 20 or 25 feet off at the time, and he did not think she could cross. He says the driver applied the brakes and swung his horses to the left, around outside of the track, to prevent a collision, but the tongue struck the phaeton, and the horses were thrown against the wheels, producing the injury complained of. On cross-examination he says that when he first noticed the car "it was pretty near right on her. Her horse had one foot just about to step on the track," but he thought the driver had time enough to stop. Mr. Fox testifies that when he first saw the car it was above De Kalb street, in front of Baker's drug store, and that from the time he first saw it the driver had time enough to stop before he got to the phaeton. These witnesses, however, had no knowledge or experience whatever of the handling of cars or of operating the brakes, and it must be conceded that, as they testify to no specific act of negligence, their mere opinion as to whether or not the driver might or might not have been able to stop the car in time, on a descending grade, was of little importance. *Traction Co. v. Bernheimer*, 125 Pa. St. 615, 38 Am. & Eng. R. Cas. 487. Mr. Holland says, "if the driver had not looked down De Kalb street, he does not suppose that the accident would have happened." This is substantially all of the testimony on part of the plaintiff bearing upon the question of the defendant's negligence, and upon this meager and unsatisfactory proof the court submitted that question to the jury. Mathias was both driver and conductor of the car, and when he was crossing De Kalb there was no one in front of him on

Same—Opinions of witnesses.

the track, and no one offering to cross. Under the circumstances, it was certainly no act of negligence to observe whether there were passengers desiring to board the cars on that crossing. There is no evidence that his attention was unnecessarily, or for any unreasonable time, withdrawn from a view of the track.

**Defendant's
negligence
not a question
for jury.**

Nor is there any evidence that he failed to apply the brakes promptly and energetically when the exigency arose. No witness has suggested that the driver did anything which he should not have done, or that he failed to do anything which he could have done, to avert the accident. On the contrary, the proof on both sides is consistent, clear, and positive that the brakes were applied at once. Mr. Berndt says he heard the clink of the brake, and noticed that the driver put on all his force. Whatever may have been the distance between the car and the phaeton when Mrs. Thomas undertook to cross the track, (and this is variously stated by the witnesses,) it is plain that, notwithstanding the efforts of the driver to stop the car, the collision occurred. Upon this state of facts we are of opinion that the court erred in submitting the question of the defendant's negligence to the jury. There was not, we think, sufficient evidence to justify an inference of the negligent act alleged.

But, assuming that the conductor, by an ordinary or an extraordinary effort, could have stopped his car in time to prevent the injury, a question still arises as to whether

**Plaintiff's
contributory
negligence.**

or not the plaintiff was not also guilty of negligence in attempting to cross the track in front of a moving car. The car was confined in its course to the rails. It could be turned neither to the right nor the left. It was running at the usual rate of four or five miles an hour, upon a descending grade, and could not be stopped as readily or as quickly as her horse, which was moving at a slow walk. She knew that a car was coming, and was near, for she admits that she was warned by the bells; but the phaeton was curtained, and the curtains were down, and she could not see the car until her horse was turned upon the track. The car she says was 30 feet distant, and she had reason to think there was no risk, and that she had time to cross. She would seem to have taken the chances and assumed the risk. Assuming that it was the duty of the driver, in order to prevent collision, to use ordinary and reasonable efforts to stop the car, the company, upon the facts of this case, was, we think, only responsible, if responsible at all, for wanton neglect, of which there is not the slightest proof. The plaintiff was without doubt, according to the testimony of her own witnesses, guilty of negligence in driving her phaeton right in

front of a moving car. She had a right to drive on the public streets, and at any point over the company's tracks, for they were laid in the street; but in doing so she was held to the exercise of ordinary care. The company, also, had a right to run their cars upon their tracks longitudinally with the street, at such reasonable rate of speed as was consistent with the safety of the travelling public; indeed, in a certain sense, the company has precedence over the ordinary travel, for, their cars being confined to the track, other vehicles must of necessity turn out, and give the cars opportunity to pass. The plaintiff knew that cars were passing and repassing upon these tracks, and before undertaking to cross she was bound to look and see that no car was coming with which she might collide. She cannot be excused from this duty because the curtains were down, and she could not see; that very fact called for a more careful observation, especially as she had been warned by the bells. The distance she was in front of the car at the time is variously stated by the witnesses, but the whole current of the testimony shows that, although the brakes were promptly applied, and the speed of the car checked, yet the collision occurred.

When the plaintiff's case was closed, the defendant moved for a compulsory non-suit, and the court refused the motion. While this action of the court is not, nor could not be, assigned for error, yet the views expressed by the learned judge of the court below as the ground of refusal illustrates in the clearest manner the error into which he appears to have fallen in his charge to the jury. He says: "Whilst it is undoubtedly true that contributory negligence on the part of the plaintiff would defeat a recovery, as I understand the law, although she may have been negligent in her manner of entering upon the tracks of this railroad company, yet if the driver of the car, when he was a sufficient distance from her to have averted the accident, could have done it, it was his duty to do so. Although she may have been an original trespasser in going upon the track, and have been negligent in crossing in the manner she did, it was his duty, if he could have done so, to have averted this accident. If he saw her about to cross, and did not take proper measures to stop the speed of his car: if it was through his neglect, after he discovered that she was upon the track, that the accident occurred,—she would be entitled to recover." The learned judge, it is true, very properly charged the jury that if the injury were caused by the negligence of Mrs. Thomas, or if her negligence contributed in any manner to it, she could not recover: but this instruction seems, in each instance, to

Refusal of
court in re-
fusing non-
suit—in-
structions.

have been qualified by the statement that, although, by her failure to look, she may have placed herself in a place of manifest danger in front of the car, yet it was the duty of the driver, observing the situation, to stop the car, and if by any means he could have done so, and did not, the company, notwithstanding her negligence, was responsible in damages for the injury, "although in this case," says the learned judge in his charge, "you should find that this lady might have attempted to cross this track at what might have appeared to be an unsafe distance, yet if, being in that position, the driver of the street car should have seen her, or did see her, and could have stopped his car in time to avert the accident, it was his duty to have done so; and, if he did not, his company would be liable for damages. Therefore, as a result of this, if you should find that this accident was occasioned by the negligence of Mrs. Thomas, she cannot recover, no matter to what extent that negligence contributed to the accident; if it contributed in any manner she cannot recover." "But," he continues, "if it was occasioned by the failure of this street car driver to stop his car, if he could have done so, then she could recover, and the company is liable."

It is plain, we think, that Mrs. Thomas, by her own negligent act, had no right to impose extraordinary duty or obligation upon the defendant. If instead of a street car this had been a train of railroad cars, running at the usual rate of speed, and approaching a road crossing, with the customary warning and signals, it would certainly not be pretended that this lady would have been justified in going upon the track with her phaeton, in case of injury, if she could afterwards show that the train might somehow have been stopped in time to prevent the injury. This would dispense with the whole doctrine of contributory negligence, as declared in the decisions of this court. If the plaintiff's negligence contributed to the injury, under the facts of this case, she cannot recover. This is too well established in Pennsylvania to admit of any question, or to require the citation of authorities.

In establishing the negligence of the company, the burden of proof is upon the plaintiff, and we think she has failed in establishing a state of facts from which negligence could be fairly inferred; and, although she is not required to prove the absence of contributory negligence in the first instance, it is incumbent upon her to show a case clear of contributory negligence on her part, and this she has not done. Her own testimony, taken with that of her own witnesses, clearly convicts her of negligence, which was the principal, if not the sole, cause of the injury.

The judgment is reversed.

Burden of proof.

Street Railways—Collision of Car With Other Vehicles.—See *Connolly v. Knickerbocker Ice Co.* (N. Y.), 39 Am. & Eng. R. Cas. 441, note 444.

Injury to Fireman by Collision of Truck with Car.—A fireman, who was unable to dress himself completely before starting for a fire, proceeded to do so while riding upon a rapidly driven ladder truck, and in so doing threw one leg over the side piece and between the rounds of a ladder, but only for the purpose of holding on while adjusting his belt. While he was in that position the truck came into collision with a street car, and the ladder was pushed back upon the truck and injured him. *Held*, in an action against the street railway company to recover for such injuries, that it could not be said, as a matter of law, that he was not in the exercise of due care. *Magee v. West End St. R. Co.*, 151 Mass. 240.

Collision of Street Car With Dray—Miscalculation of Distance.—Where, in an action by the driver of a dray, against a street railway company, to recover damages for personal injuries, the testimony of the plaintiff showed no negligence on the part of the companies' employees, but merely a miscalculation of distance on the part of both the plaintiff and the driver of the car, it was not error to enter a judgment of nonsuit. *Patton v. Philadelphia Traction Co.*, 132 Pa. St. 76.

Collision of Car with Wagon Injuring Person Standing by.—In *Koch v. St. Paul City R. Co.* (Minn., Feb. 10, 1891), 48 N. W. Rep. 191, the action was brought by Koch, to recover of the defendant, damages for personal injuries caused by alleged negligence of defendant in operating one of its street cars. The evidence on the trial showed that while the plaintiff who was a market gardener, was standing near his wagon outside the markethouse on Seventh street, St. Paul, one of defendant's cars, which was being driven along the street, collided with a farmer's wagon standing near the car track, throwing the wagon forward against plaintiff's wagon, which struck plaintiff, throwing him down, and inflicting the injuries complained of. There was evidence that the wagon collided with was standing still when struck, and so near the track that the car could not possibly pass clear of it. *Held*, that the evidence on the question of the defendant's negligence made the case a proper one for the jury, and their verdict cannot be disturbed.

Collision with Wagon—Evidence to Show Negligence.—In *Northside St. R. Co. v. Want*, (Texas Court of Appeals, Nov. 12, 1891), 15 S. W. Rep. 40, it was held that where a car which collided with a wagon on the track was running at its usual speed, and it did not appear that the driver saw or could have seen, the danger of a collision, nor that he could have averted it after the danger became apparent, the evidence failed to establish negligence, negligence cannot be inferred from the mere fact that there was a collision.

CORNELL

v.

DETROIT ELECTRIC RAILWAY CO.

(82 Michigan, 495.)

Electric Railway—Frightening Horse—Contributory Negligence.—The plaintiff, with full knowledge of the situation and danger, drove a young horse alongside of an electric street railway, for the express purpose of testing him to see how he would act. The horse took fright at an approaching train, and ran away and injured the plaintiff. *Held*, that plaintiff's contributory negligence was a bar to a recovery for the injuries received.

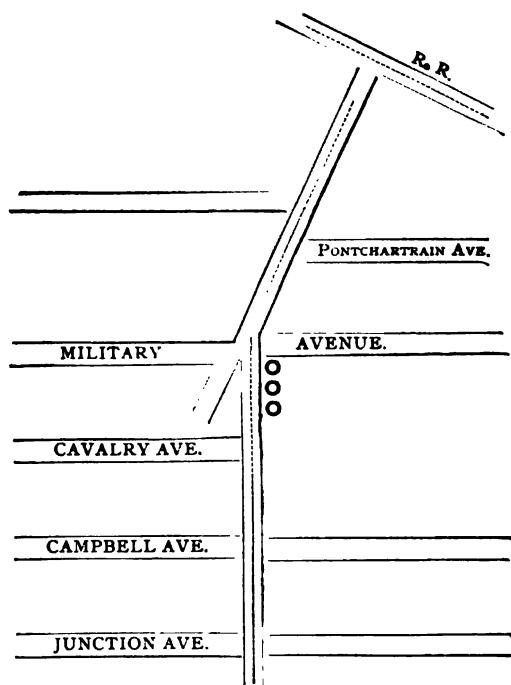
ERROR to Wayne County Circuit Court.

Action to recover damages for personal injuries. Defendant brings error.

Russell & Campbell, for appellant.

James H. Pound, for appellee.

GRANT, J.—The defendant owns and operates an electric railway upon Dix avenue, in the city of Detroit, under authority granted by the city. At the time of the accident complained of, the street was not paved; the track was laid in the center, and was several inches higher than the roadway upon either side, thereby rendering it somewhat difficult for persons to drive from one side to the other, except at the street crossing. The situation of Dix avenue, and of the streets crossing it near where the accident occurred, is as follows:



The land in the vicinity was open common, except three houses situated at the corner of Dix and Military avenues. Plaintiff had a horse and buggy, and was driving on the right hand side of the street. His statement is substantially as fol-

lows: He had crossed Campbell avenue, and was within about 25 feet of Cavalry avenue, when he saw the cars coming around the bend, about 350 feet distant. He stopped his horse, put up his hand as a signal to stop the train, jumped out of his buggy, and took his horse by the head. He judged that the cars were about half way down when he caught his horse by the head, and that they were slowing down. The horse began to exhibit signs of fear, and he led him across the sidewalk into the open field. The horse dragged plaintiff around the open field, and finally turned, and dragged him across the street onto the track, where plaintiff fell and was injured, and the horse ran away. When the horse began to run with the plaintiff, the car, according to his own testimony, was about 150 feet distant, and slowing down, and stopped before reaching the point in the street where plaintiff stopped his horse. The testimony on the part of the defense was that the person in charge of the car saw plaintiff when about 400 feet distant; that he saw signs that the horse was frightened; that he rung the gong when nearing the bend, which statement is not disputed; that he ran slowly for about 250 feet, when he brought the car to a stop; that the horse did not cross the track, but that he came back over the sidewalk into the street, then turned around, and ran across the sidewalk again into the open lot; that plaintiff stumbled on the sidewalk as the horse was going over it the second time; and that all usual and necessary precautions were taken by the defendant's servants. The negligence alleged is that defendant did not observe sufficient caution in coming around the bend to alarm plaintiff, so as to enable him to avoid the trouble complained of; but that, without notice, and at a great rate of speed, it caused its cars to come suddenly around the bend as plaintiff was approaching. There is no evidence that any other notice than the noise produced by the running of the cars and the ringing of the gong would have been of any avail, nor that there was not sufficient. Plaintiff has not even suggested the necessity of any other notice. But any question of notice is eliminated from the case by the plaintiff's own testimony. He was familiar with the situation. He had driven there before, and had had trouble with other horses. He was on the lookout, and saw the cars as soon as they reached the bend. Any additional noise for the purpose of giving notice would certainly have tended to increase his horse's fright, without being of any possible use. The record fails to show any negligence on the part of the defendant. The rate of speed is not shown to have been unusual, or excessive. The horse

Negligence alleged in defendant.

Plaintiff's contributory negligence a bar to recovery.

evidently became restive and somewhat frightened when the cars first appeared in sight, 350 or 400 feet distant. Defendant's servants in charge of the cars were not under obligations to immediately stop them. They had fulfilled their duty by commencing to run more slowly. If such companies were obliged to stop their cars at that distance upon seeing a horse, with his owner holding him by the head, in apprehension of fright, or in actual fright, they could not meet the demands or the requirements of public travel. The defendant had an equal right to the use of the street with its cars as plaintiff with his horse. Each was bound to exercise due care and caution; and this the defendant did. It was evidently the sight of the moving cars, not their speed, that frightened the horse. They were from 150 to 200 feet distant when plaintiff and his horse went over the sidewalk into the common. It is difficult to see how the defendant's servants were under any legal obligation to act differently from what they did.

The plaintiff is not entitled to recover on his own statement. He took his horse, three years old, which was unused to the place or the cars, and for the purpose of trying him. He testified: "I never had the horse there before. I wanted to see how he acted." He knew the danger of his horse becoming frightened, and yet he took him into this dangerous place knowing that the cars were coming. There was ample opportunity for him to have turned into another street where there was less danger in subjecting his horse to the sight of the cars. It was also admitted upon the hearing that there were other streets by which he might have reached his destination. It is common knowledge that such vehicles, when first seen in motion, have a tendency to frighten animals. When one deliberately drives into such a place as this was, with a full knowledge of the situation and danger, for the express purpose of testing his horse, he is guilty of contributory negligence, and, under the decisions of this court, is not entitled to recover. This disposal of the case renders it unnecessary to discuss the other assignments of error. The judgment must be reversed, and a new trial ordered, with costs of both courts. The other justices concurred.

Street Railway—Frightening Horses.—See *Peoples' Pass. R. Co. v. Hazel* (Pa.), 43 Am. & Eng. R. Cas. 400.

In *North Side St. R. Co. v. Tippins*, (Texas Ct. of App., Nov. 1, 1890), 14 S. W. Rep. 1067, it appeared that the plaintiff hitched his team to a post on a street occupied by an electric street railway. The defendant's electric street car in passing, frightened the horses which broke loose and ran away. The driver of the street car, at the time of the accident, was sounding a gong while the car was moving along the track. This noise was made to warn persons of the approach of the car, and to prevent accidents. *Held*, that it could not be said that the accident was caused by the negligence of

the street car company. The court said: "We conclude, therefore, that the sounding of the gong did not constitute negligence. Appellant had the legal right to operate its street cars upon said street, and could only be liable in damages for injury caused by the carelessness of those operating them. It was not shown that the driver of the car was aware that appellee's horses were frightened, and would probably break loose and cause injury to appellee's property unless he ceased to sound the gong. In other words, it was not made to appear by the evidence that, by the use of ordinary care and prudence, the driver of the car could have prevented the injury. It was the duty of the driver to watch the track upon which the car was being propelled, and to avoid collisions and accidents upon the track. He was not required, we think, to keep a lookout for teams not upon or approaching the track. He might well act upon the presumption that teams not upon or approaching the track, but which were standing on the sides of the street, were seemingly hitched, or, if not so hitched, were not liable to become frightened and run off. *Hargis v. St. Louis, A. & S. R. Co.*, 75 Tex. 23. Because the evidence fails to show a good cause of action, the judgment is reversed and the cause is remanded."

Injury Caused by Defective Street Railway Track.—In *Nivette v. New Orleans City & L. R. Co.*, (Louisiana, Dec. 15, 1890), 8 So. Rep. 581, it was held that where a wagon is driven from a street railway track, and the occupant is thrown from it by the jolt of the wagon, incident only to the turning out of the track, the railroad company is not responsible in damages. The proof of the general bad condition of the street alone is not sufficient for the plaintiff to recover. The proof must be specific that the accident was caused by the defect in the street specially alleged and referred to in the petition as the immediate cause of the accident.

In *Cowan v. Muskegon R. Co.* (Mich. Sup. Ct., Feb. 27, 1891), 48 N. W. Rep. 166, it appeared that at the time of the accident the defendant street railway company was engaged in extending and laying its tracks, and had excavated and dug up the ground in a certain street. Plaintiff's buggy was being driven upon that street in the night time and coming upon a heap of dirt thrown up by the company, was capsized and injured. Plaintiff's declaration failed to allege that the earth was allowed to remain in the street for an unreasonable time, or that there were no lights or barriers. *Held*, that there could be no recovery, since it was not negligence on the part of the defendant merely to excavate while engaged in laying its tracks. The court said: "We think the court should have directed a verdict for the defendant. In the ordinary course of operating its street railway the defendant was engaged in repairing and laying its track, which it had the undoubted right to do; and it was not negligence for it to excavate and throw up earth while thus engaged. The proofs do not show that the earth was allowed to remain there for an unreasonable time, nor does the declaration allege that it was allowed to remain there in the night time, or without lights or barriers. Again, the declaration avers that Call was driving at the time of the accident, while the proofs showed that the young lady was driving, and the declaration contains no averment that she was exercising due care. Not only is there a material variance between the declaration and the proofs, but the declaration fails to set forth a cause of action. The judgment is reversed and a new trial granted."

UNITED ELECTRIC R. CO. *et al.*

v.

SHELTON.

(Tennessee Supreme Court, December 7, 1890.)

Electric Street Railway—Live Wire—Injury to Horse.—A broken telephone wire fell across the trolley wire of an electric street railway, and while resting upon it, plaintiff's horse, being driven along the street, came into contact with it, and was instantly killed. There was no guard wire over the trolley wire, and the condition of the telephone wire was such as to arrest the attention of prudent men. *Held*, that both the telephone company and the railway company were liable for the injury.

APPEAL from Circuit Court, Davidson County.

Steger, Washington & Jackson and *Vertrees & Vertrees*, for appellants.

John L. Nolen, for appellee.

TURNER, C. J.—Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company, which had fallen across the trolley wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident, the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley wire, and, while resting on it, the horse came in contact with it, and was instantly killed. There was no guard wire over the trolley wire. The case was tried by the circuit judge without the intervention of a jury. The condition of the telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence, and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also a duty of the electric company to see that its trolley was in like manner, protected from such contingency. While it was the duty of the one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under

Both companies negligent.

such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a hanging rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley, and the consequences of a contact of the wires of the one with those of the other. Both knew of the unsoundness likely to produce a fall of the one upon those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable. Affirmed.

FARRELL

v.

WATERBURY HORSE R. CO.

(Connecticut Supreme Court of Errors, March 20, 1891.)

Negligence—Province of Court on Jury—Questions of Law and Fact.—In cases involving the question of negligence where the general rule of conduct is alone applicable, and there is no particular standard of care, and where the facts found are of such nature that the trier must exercise a sound discretion based upon his experience, not only upon the question what did the parties do or omit, under the circumstances, but upon the further question, what would a prudent man have done under those circumstances, and especially where the facts are of such a nature that fair minded men might come to different conclusions upon the latter question,—the inference of negligence is one to be drawn by the trier, and not by the court as a matter of law. Such inference will be treated by the Supreme Court as one of fact, which will not be reviewed where the facts have been properly found, unless the record shows that some rule of law has been violated.

APPEAL from Waterbury District Court.

J. O'Neill, for appellant.

G. E. Terry, for appellee.

TORRANCE, J.—This is an action brought to recover damages for an injury caused to the plaintiff by the negligence of the defendant in the management of one of its horse cars on a public highway. The case was defaulted Case stated. and heard in damages. The court below made a finding of the subordinate and evidential facts, bearing upon the question of the negligence of the defendant, and the contributory

negligence of the plaintiff, and then added the following: "I find that the defendant was not negligent in running the car in the manner above described, unless the foregoing facts constitute negligence. On the foregoing facts, however, I find that the plaintiff was guilty of contributory negligence, and therefore assess to him seventy-five dollars only, as nominal damages. If the plaintiff was not in the above recited facts guilty of contributory negligence, his injuries were of such a character that he should recover sixfold the assessed damages." Upon the trial below the plaintiff made

**Consideration
of errors—
Record.**

certain claims upon matters of law, which are set forth in the record. Four of the six reasons of appeal filed in this case are based upon the assumed fact that the court below decided these claims adversely to the plaintiff. But the record neither expressly, nor by necessary implication, discloses any such fact. For aught that appears, the court below took the view of the law, as expressed in these claims, which the plaintiff asked it to take. This court, upon an appeal, cannot consider any error assigned in the reasons of appeal, unless "it also appears upon the record that the question was distinctly raised at the trial, and was decided by the court adversely to the appellant's claims." Gen. St. § 1135. We cannot, therefore, consider the matters set forth in the last four reasons of appeal.

This leaves to be considered only the first two reasons of appeal, which are stated as follows: "(1) The court erred in deciding that the defendant, on the facts found, was not negligent. (2) In deciding that the plaintiff was guilty of contributory negligence.

The plaintiff claims that the conclusions of the trial court upon the facts found, as to the negligence of the defendant,

**Power to re-
view finding.**

and the contributory negligence of the plaintiff, are inferences or conclusions of law, which may be reviewed by this court upon an appeal, and the defendant's claims that they are inferences or conclusions of fact, which cannot be so reviewed. If the plaintiff is right in his claim, this court can and ought to review the conclusions aforesaid. If the defendant is right, there is, properly, no question presented upon the record for the consideration of this court. Whether, in a given case involving the question of negligence of either the plaintiff or defendant, the conclusion or inference of negligence drawn by the trier or triers is one which this court has or has not the power to review, is always an important, and often a difficult, question to determine. Its importance arises from the fact that in the former case such conclusion may, upon review, be either sustained or set aside by this court; while in the latter case such con-

clusion, whether drawn correctly or not, is, generally speaking, final and conclusive. The difficulty of determining whether the conclusion belongs to one or the other of these classes arises, in part at least, from the complex nature of negligence, as a legal conception, and the fact that the word "negligence" is frequently used for only a part of this complex conception. Complex nature of negligence.

"Negligence, like ownership, is a complex conception. Just as the latter imports the existence of certain facts, and also the consequence (protection against all the world) which the law attaches to those facts, the former imports the existence of certain facts, (conduct,) and also the consequence (liability) which the law attaches to those facts." Holmes, *Com. Law*, p. 115. This conception involves, as its main elements, the subordinate conceptions of a duty resting upon one person respecting his conduct towards others, a violation of such duty, through heedlessness or inattention on the part of him on whom it rests; a resulting legal injury or harm to others as an effect; and the legal liability consequent thereon. Accordingly, as a legal conception, "negligence" has been defined as follows: "A breach of duty, unintentional, and proximately producing injury to another possessing equal rights." Smith, *Neg. p. 1*. But neither in text books, nor in judicial decisions, is the word "negligence" used at all times as standing for all the elements of this entire complex conception. When in courts of law, the principal question is, what was the conduct? it is customary and perhaps allowable, to say that the question of negligence is one of fact, to be determined by the trier, and, when the question principally respects the duty or the liability, to say that it is a question of law. When, therefore, in text books, or in adjudged cases, the assertion is made that the "question of negligence" is a "question of fact," or is a "question of law," or is a "mixed question of law and of fact," no confusion of thought will result, if the sense in which the word "negligence" is used in the particular instance be ascertained, and this, in most cases, may be readily determined from the context.

But another, and perhaps the chief, cause of the difficulty of determining, in a given case, whether the conclusion as to negligence is one of law or of fact, arises from another source, which we will now consider. The conception of negligence, as we have seen, involves the idea of a duty to act in a certain way towards others, and a violation of that duty by acts or conduct of a contrary nature. The duty is imposed by law, either directly by establishing specific or general rules of conduct binding upon all persons, or indirectly, through legal agreements, made by

Standard of conduct.

the parties concerned. It is with duties not arising out of contract that we are here concerned. There is further involved, in the legal conception of negligence, the existence of a test or standard of conduct, with which the given conduct is to be compared, and by which it is to be judged. The question whether the given conduct comes up to the standard is frequently called the question of negligence. The result of comparing the conduct with the standard is generally spoken of as "negligence," or "the finding of negligence." Negligence, in this last sense, is always a conclusion or inference, and never a "fact," in the ordinary sense of that word. When the question of negligence, in the above sense, can be answered by the court, it is called a question of law, and the answer is called an inference or conclusion of law; when it is and must be answered by a jury or other trier, it is generally called a question of fact, and the answer is called an inference or conclusion of fact. Where the law itself prescribes and defines beforehand the precise specific conduct required, under given circumstances, the standard by which such conduct is to be judged is found in the law. When, in such a case, the conduct has been ascertained, the law, through the court, determines whether the conduct comes up to the standard. The rules of the road, some of the rules of navigation, and the law requiring the sounding of the whistle or the ringing of the bell of a locomotive approaching a grade crossing, at a specified distance therefrom, may serve as instances of this kind. Of course, if, in cases of this kind, one of the parties injures another, he is not necessarily absolved from blame, by showing a compliance with the specific rule of law, for it may be that while so doing he neglected other duties which the law imposed upon him. But when the only question is whether the ascertained conduct comes up to the standard fixed by the specific rule or law, the conclusion, inference, or judgment that it does or does not is, as we have said, one of law. A question of law, in the true sense, is one that can be decided by the application, to the specific facts found to exist, (here the conduct of some person, and the circumstances under which he acted or omitted to act,) of a pre-existing rule. Such a rule must contain a description of the kind of circumstances to which it is to apply, and the kind of conduct required. Terry, *Anglo-Amer. Law*, par. 72.

In such cases, as this court said in substance in *Hayden v. Allyn*, 55 Conn. 289, the evidence exhausts itself in producing the facts found. Nothing remains but for the court, in the exercise of its legal discretion, to draw the inference of liability or non-liability, and this inference or conclusion can,

in such cases, always be reviewed by this court. Clear cases of this kind usually present no difficulty. As applicable to most cases, however, the law has not provided specific and precise rules of conduct; it contents itself with laying down some few wide, general rules. The rule that all persons must act and conduct themselves, under all circumstances, as a man of ordinary prudence would act, under like circumstances, is an illustration of this class of rules of laws. The general rule of conduct is not a standard of conduct, in the same sense in which a fixed rule of law is such a standard. In most cases, where it must be applied, the principal controversy is over the question, what would have been the conduct of a man of ordinary prudence, under the circumstances? Manifestly the rule itself can furnish no answer to that question in such cases. "The rule usually propounded, to act as a reasonable and prudent man would act in the circumstances, still leaves open the question how such a man would act." *Id.* It is also a varying standard. "In dangerous situations, ordinary care means great care; the greater the danger the greater the care required; and the want of the degree of care required may amount to culpable negligence." *Knowles v. Crampton*, 55 Conn. 344. This general rule has rightly been called "a featureless generality," but, from the necessity of the case, it is the only rule of law applicable in the great majority of cases involving the question of negligence. The law cannot say beforehand how the man of ordinary prudence would act, or ought to act, under all or any probable set of circumstances. But in cases involving the question of negligence, where this general rule of conduct is the only rule of law applicable, it may, and sometimes does, happen that the conduct under investigation is so manifestly contrary to that of a reasonably prudent man, or is so plainly and palpably like that of such a man, that the general rule itself may be applied as a matter of law, by the court, without the aid of a jury; that is, the conduct may be such that no court could hesitate or be in doubt concerning the question whether the conduct was or was not the conduct of a person of ordinary prudence, under the circumstances.

The difference between the classes of cases where the court can thus apply the general rule of conduct, and those wherein it must be applied by the jury, is well illustrated in the following extract from the opinion of the supreme court of the United States in the case of *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.), 657. "If a sane man voluntarily throws himself in contact with a passing engine, there being nothing to counteract the effect of this action, it may be

Cases where court may apply rule and where jury must—Authorities.

ruled as a matter of law that the injury to him resulted from his own fault, and that no action can be sustained by him or his representatives. So, if a coach driver intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled, as a question of law, that there was no negligence and no liability. But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of sound judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another equally sensible and equally impartial man would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury." The line of division between these two classes of cases is by no means a fixed and well defined one. Close cases will occur where courts may well differ in opinion as to whether they lie on one side or on the other of the boundary line. "Legal, like natural, divisions, however clear in their general outline, will be found, on exact scrutiny, to end in a penumbra or debatable land." Holmes, Com. Law. p. 127. Now, the difficulty of determining whether a conclusion or inference of negligence is one "of fact" or one "of law," as these phrases are commonly used, arises mainly in this intermediate class of cases. In such cases, the law itself furnishes no certain, specific, sufficient standard of conduct, and, of necessity, leave the trier to determine, both what the conduct is, and whether it comes up to the standard, as such standard exists in the mind of the trier. In a case of this kind, the inference or conclusion of the trier, upon the question whether the ascertained conduct does or does not come up to such standard, is, as we have said, called a "question of fact," and, generally speaking, it cannot be reviewed by this court. If such inference is drawn by a jury, it is final and conclusive, because their opinion of what a man of ordinary prudence would or would not do, under the circumstances, is the rule of decision in that special case. If drawn by a single trier, as it may be, under our system of law, it is equally final and conclusive for the same reason. In every such case, the trier, for the time being, adopts his own opin-

ion, limited only by the general rule of what the man of ordinary prudence would or would not do, under the circumstances, and make such opinion the measure or standard of the conduct in question. This view of the subject is forcibly put by COOLEY, J., in the case of *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99, wherein he says: "When the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measures the plaintiff's conduct by that. He thus makes his own opinion of what the prudent man would do a definite rule of law." And, in speaking of this same matter, the supreme court of Pennsylvania uses the following language: "When the standard shifts with the circumstances of the case, it is, in its very nature, incapable of being determined as a matter of law and must be submitted to the jury. There are, it is true, some cases in which a court can determine that omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances. When the duty is defined, a failure to perform it is, of course, negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. Such was this case. The question was not, alone, what the defendants had done or left undone; but, in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve." And later on, in the same opinion, in commenting upon a case cited by the plaintiff, the court says: "Even if the court might, in that case, have declared the effect of the evidence, it must have been because the duty of the defendants was unvarying, and well defined by the law. Here the standard of duty was to be found as a fact, as well as the measure of its performance." *McCully v. Clark*, 40 Pa. St. 399. In his book on the common law, Judge Holmes speaks as follows: "When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men, taken from the practical part of the community, can aid its judgment." Holmes, *Com. Law*. p. 123.

In treating of contributory negligence, Mr. Beach, in his work on that subject, says: "In the ultimate determination of the question whether the plaintiff was guilty of contributory negligence, two separate inquiries are involved: *First*, what was ordinary care, under the circumstances? *Second*, did the conduct of the plaintiff come up to that standard? With respect to the standard of ordinary care, it is not always a fixed standard. In many cases it must be found by the jury. In such a case, each of these inquiries is for the jury. They must assume a standard, and then measure the plaintiff's conduct by that standard. Whenever the standard is fixed, and when the measure of duty is precisely defined by law, then a failure to attain that standard is negligence in law, and a matter with which the jury can properly have nothing to do." Beach, Contrib. Neg. p. 459, § 163. The distinction between these two classes of cases is a fundamental one, and not one of mere form. It is sometimes said that, where all the facts are found, the mode of stating the inference or conclusion of negligence will make it one of law or fact, as the case may be. But this clearly is not so. No mere mode of statement, whether found in a special verdict or in a special plea, or in a finding of facts, can convert the one into the other. In *Beers v. Housatonic R. Co.*, 19 Conn. 566, this court said: "If it were competent for the defendants to have availed themselves of a want of ordinary and reasonable care on the part of the plaintiff by a special plea, and that plea should allege merely the facts or circumstances on which the defendant claims that the court should have declared to the jury that such want of care was proved, or if they had been found in a special verdict by the jury, it is quite clear that such plea or verdict would be unavailable to the defendants on the question, for the reason that the one would allege, and the other would find only evidence of the fact in issue, and not the fact itself." In *Williams v. Clinton*, 28 Conn. 264, this court said: "Under the pleadings, the issue presented nothing but a question of fact—was there or not culpable negligence on her part? We cannot permit such a question to be taken from the jury, the legal and constitutional tribunal, by the defendants specially reciting the evidence adduced on the trial, and claiming that the court shall instruct them as to its legal effect. Such a course would speedily put an end to all jury trials." In *Fiske v. Forsyth, etc., Bleaching Co.*, 57 Conn. 119, this court said: "The only error assigned in this case is that the court below held that, 'upon the facts found, the defendants were guilty of negligence in leaving their horses unhitched, and unattended, in the manner described.' The finding of the court states all the facts with great particular-

ity. * * * But the question of negligence cannot thus be made a question of law." In the following cases the findings of facts were substantially similar in form to the finding of facts in the case at bar, yet this court held, and rightly, that it had no power to review the conclusion as to negligence. *Daniels v. Saybrook*, 34 Conn. 377; *Congdon v. Norwich*, 37 Conn. 414; *Young v. New Haven*, 39 Conn. 435; *Brennan v. Fair Haven & W. R. Co.*, 45 Conn. 284; *Davis v. Town of Guilford*, 55 Conn. 356, 18 Am. & Eng. Corp. Cas. 281. On the other hand, where special findings of fact were made, and from those facts the trial court formally drew the conclusion as to negligence, this court, notwithstanding the form of the finding, held the conclusions to be conclusions of law, and reviewed them. *Beardsley v. Hartford*, 50 Conn. 529, 4 Am. & Eng. Corp. Cas. 595; *Nolan v. New York & N. H. R. Co.*, 53 Conn. 461, 25 Am. & Eng. R. Cas. 342; *Bailey v. Hartford & C. V. R. Co.*, 56 Conn. 444, 37 Am. & Eng. R. Cas. 483; *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9.

It is frequently supposed or assumed that it makes some difference in this matter whether the case is tried to the jury or to the court, but this is not so. Whether the trier is one man or twelve men makes no difference.

Whether
court or jury
is trier imma-
terial.

If the case is such that the trier, and not the law, must determine whether the conduct in question is or is not that of the prudent man, the conclusion of the single trier upon this point is just as binding and final as that of twelve men. In *Shelton v. Hoadley*, 15 Conn. 535, this court held that where an issue of fact is closed to the court, instead of to the jury, the conclusion of the court cannot be reviewed upon a bill of exceptions, which sets out all the facts, any more than the verdict of a jury could be in like circumstances. And in *Brady v. Barnes*, 42 Conn. 512, it is said: "When an issue of fact is closed and tried by the superior court, this court will not, upon evidence reported, assume the responsibility of finding, by inference therefrom, a fact which that court could not find. The principles and the reasons which protect the sovereignty of juries over facts, when issues are closed to them, underlie this right of auditors and committees in chancery: for they are but statutory juries finding facts by forms of procedure peculiar to themselves." So, also, in *Stannard v. Sperry*, 56 Conn. 541, it is said: "Under our system, whenever the court, or a committee of its appointment, finds a fact, such finding is beyond revision or correction, equally with the verdict of a jury, if there be no illegality in the mode of proceeding, and no intentional wrong done. Errors of judgment as to the value of property must stand uncorrected. This is equally true of the finding of a

committee appointed to hear and find in place of and for the court. If its finding of facts is to be reviewed in every case by the court, its hearing becomes a useless expenditure of labor and money." It may be said that this view of the subject leaves the parties at the mercy of the trier. A like objection, taken in the case last above cited, was thus answered in the opinion: "The defendant suggests that, if this be so, he is at the mercy of the committee, as to the value of his part. But this fact does not vitiate the proceeding. That every person shall be at the mercy of some tribunal, both as to law and fact, is the only reason for the existence of a judicial system."

The distinction in question, then, being in general a fundamental and important distinction, the question remains whether any general rule exists, the application of which will determine in every case, with certainty, whether the inference as to negligence to be drawn from ascertained facts is one of fact or of law, in the sense explained. Perhaps no such general rule has been or can be formulated. At any rate, we know of none, and we do not intend in the present case to lay down any such general rule. But cases involving the distinction in question have been frequently before the courts; they have been decided upon principles which have been, to some extent, formulated into working rules; and these rules can be applied with reasonable certainty in most cases that arise in actual practice. In his work on Torts, Judge Cooley states such a rule as follows: "The proper conclusion seems to be this: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute." Cooley, Torts, p. 670. In the case of *Detroit & M. R. Co. v. Van Steinburg*, *supra*, Judge COOLEY stated the rule as follows: "It is a mistake to say, as is sometimes said, that, when the facts are undisputed, the question of negligence is necessarily one of law. This is generally true only of that class of cases, where a party has failed in the performance of a clear, legal duty. When the question arises upon a state of facts on which reasonable men may fairly arrive at different conclusions, the fact of negligence cannot be determined until one or the other of these conclusions has been drawn by the jury. The inferences must either be certain or uncontrovertible, or they cannot be decided by the courts." Wharton says:

The formula-
tion of a gen-
eral rule.

"The true position is this: Negligence is always a logical inference, to be drawn by the jury from all the circumstances of the case, under the instructions of the court. In all cases in which the evidence is such as not to justify the inference of negligence, so that a verdict of a jury would be set aside by the court, then it is the duty of the court to negative the inference. In all other cases the question is for the jury, subject to such advice as may be given by the court as to the force of the inference." Whart. Neg. § 420. The rule laid down by Judge COOLEY is substantially like the one adopted by the supreme court of the United States in the case of *Sioux City & P. R. Co. v. Stout*, *supra*. The rule is thus stated in Terry, *Anglo-Amer. Law*, par. 72: "The question, was the specific conduct of the specific person, in the specific circumstances, reasonable or not? must usually remain as a question which is really one of fact. When the reasonableness or unreasonableness of the conduct is very plain, the court will decide it. When it seems to the court fairly to admit of doubt, it will be handed over to the jury." Mr. Beach, in his work on *Contributory Negligence*, p. 454, states the rule as follows: "When the facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law." In *Ochsenbein v. Shapley*, 85 N. Y. 214, the court stated the rule thus: "When the facts are undisputed, and do not admit of different or contrary inferences, the question is one of law for the court." This also substantially appears to be the rule in Ohio and California. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631; *McKeever v. Market St. R. Co.*, 59 Cal. 294, 19 Am. & Eng. R. Cas. 123. It is perhaps unnecessary to say that, in making the foregoing citations from text-writers and decisions, we do not necessarily adopt or approve of all their conclusions, or the rule precisely as stated by them; but we think some of the principles stated, upon which the rules are or profess to be based, will furnish a practical guide for the solution of the question we are considering, in cases like the one at bar. Manifestly this frequently recurring question ought to be decided upon principle, so far as it is possible to do so.

We think an examination of the cases from our own reports, heretofore cited, and of others therefrom, that might be cited, involving the question of negligence, will show that this court, in such decisions, has applied principles which, in most cases occurring in practice, will solve the question under consideration without much difficulty. From such an exam-

ination, we think it will appear that, in cases involving the question of negligence, where the general rule of conduct is alone applicable; where the facts found are of such a nature that the trier must, as it were, put himself in the place of the parties, and must exercise a sound discretion, based upon his experience, not only upon the question what did the parties do or omit, under the circumstances? but upon the further question, what would a prudent, reasonable man have done under those circumstances? and especially where the facts and circumstances are of such a nature that honest, fair-minded, capable men might come to different conclusions upon the latter question,—the inference or conclusion of negligence is one to be drawn by the trier, and not by the court as matter of law. Such an inference or conclusion will, speaking generally, be treated by this court as one of fact, which will not be reviewed where the facts have been properly found, unless the court can see from the record that in drawing such inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them under the circumstances, or in some other respect violated some rule or principle of law. Of course, we do not here mean to say that this court cannot review such a conclusion upon an appeal from a verdict against evidence, or that it may or may not do so upon a reservation or other proceeding of a like nature. We only mean to say that, in cases where it is the province of the trier to draw the inference of negligence, and no error of law in the sense explained is apparent on the record, error cannot be predicated of the mere act of the trier in drawing what is supposed to be an incorrect or wrong inference from facts properly found. We think these principles can be applied to the case at bar, and that they are decisive of it.

The principal facts are correctly found. They are somewhat numerous, and the question of the negligence of either party is complicated with questions as to the conduct of others, and with the special facts and circumstances of the case of which the conduct forms a part. Under the facts found, the only rule applicable was the general rule of conduct. The facts and circumstances are, we think, clearly of such a nature that a trier must, of necessity, measure the prudence of the parties' conduct by a standard of behavior which he himself adopts for that case, based upon his opinion of the manner in which a man of ordinary prudence would act, under the same circumstances. The problem involved in such an inquiry can only be solved by the trier placing himself in the position of the parties, and, in the light of his experience of human affairs,

Conclusions
of trier not
reviewable.

examining all the facts and circumstances as they appeared to them at the time. Furthermore, we think the facts found are of such a nature that men equally honest and impartial might, and probably would, from them draw different and opposite inferences as to whether due care was or was not exercised by each party, under the circumstances. It is not apparent upon the record that the court, in arriving at the conclusions, as to negligence, in the case at bar, imposed upon either party the performance of any duty which the law did not impose, nor that it did not require of them the performance of any duty which the law did require, nor that, in any other respect, it violated any rule or principle of law. For these reasons we think the case at bar comes within the class of cases where the conclusions of the trier, both as to negligence and contributory negligence, are regarded as conclusions of fact, which this court cannot review. There is no error apparent upon the record. The other judges concur.

When Inference of Negligence is a Question of Fact, and when of Law.—See *Swift v. Staten Island Rapid T. Co.* (N. Y.), 45 Am. & Eng. R. Cas. 180; *Smith v. Savannah F. & W. R. Co.* (Ga.), 42 *Id.* 105; *Interstate, etc., R. Co. v. Fox* (Kan.), 39 *Id.* 318; *Chicago, etc., R. Co. v. Dunleavy* (Ill.), 39 *Id.* 381.

BOROUGH OF MILLVALE

v.

EVERGREEN R. CO.

(131 Pa. St. 1.)

Incorporation of "Passenger Railway"—Franchise Conferred.—The use of the term "passenger railway" in the title of an act incorporating a railway company does not restrict the franchise conferred to the operation of a railway upon the streets of a municipality, without authority to carry anything but passengers, or to use steam cars or the kind of rails appropriate therefor.

Same—Sufficiency of Title of Act.—The act entitled "An Act to incorporate the Lawrenceville & Evergreen Passenger Railway Company" was sufficient to authorize the passage thereunder, prior to the constitution of 1874, of an act granting a special charter for a steam railroad.

Same—Title to Act Supplementary to Former Act.—An act entitled "A supplement to an Act to incorporate the Lawrenceville & Evergreen Passenger Railway Company, approved May 13, 1871" which authorizes such company to extend its road, and gives it certain additional powers, is not unconstitutional, by reason of its title.

Charter Right to Lay Tracks in Public Road—Consent of Borough Authorities.—A railroad company has the right to construct and operate its road upon and along the streets of an incorporated borough, without obtaining the consent of the borough authorities thereto, where its charter gives it, without qualification, the right to lay its tracks upon any public road.

Authority to Lay T Rails in Street—Charter Powers.—A railroad company authorized to construct its tracks in the public roads, and to use steam and carry freight, has authority to lay on a street the T rails in common use, although such rails be not expressly authorized, and they obstruct travel, more than those used by horse railroads.

Authority to Change Gauge of Railroad.—A railroad company not specially restricted by its charter as to the gauge of its track, may change its gauge, or the character of its rails at any time, provided, that it keeps within the limits of its chartered rights.

BILL in Equity by the burgess and town council of the borough of Millvale against the Evergreen Railroad Company, and the Pittsburgh & Northern Railroad Company, to restrain defendants from constructing their road in the streets of the borough, and from changing the gauge of their tracks. Complainant appeals from a decree dismissing the bill.

Lyon & Shoemaker, for appellant.

Johns Mcleave, for appellees.

GREEN, J.—Notwithstanding the very ingenious and elaborate argument of the learned counsel for the appellant, we feel constrained to concur with the master and court below in their view of the contention between these parties.

It is very earnestly argued for the appellant that both the original act of incorporation of the defendant company and the supplement thereto are in hostility with the provisions of the constitution, and therefore void.

Incorporation of passenger railway—Franchise— The basis of the argument as to the act of incorporation is that the title of the act conveys a purpose to charter a passenger railway company, whereas the text of the act really charters a steam railroad company, and the two are so inconsistent that the text must fall. If it were true that a passenger railway could only be a railway laid upon the streets of a municipality, of a very limited extent, propelled only by horse power, without authority to carry anything but passengers, and limited to the use of a particular kind of rail, upon which steam cars and engines could not be propelled, there would be considerable force in the argument. But there is no such definition of a "passenger railway," and there never was. It is true that when passenger railways, located upon the streets of cities and towns, were first built and used they were, in point of fact, usually characterized by some of the above qualifications. But that circumstance proves nothing as to the extent or kind of the corporate franchises in any particular case. There was no general law at that time under which this class of railroad companies could be incorporated, and hence there were no means of determining what the corporate franchises were, except by an examination of the act of incorporation in

each instance. These were altogether without uniformity. The language of the learned master in his report in this case describes them correctly when he says: "They all, like the defendant company, existed and held their franchises under and by virtue of special acts of incorporation, and, while usually confined by the terms of their charters to the streets of a particular town or city, such limitation was neither necessary nor universal, while the powers conferred differed in scope in almost every instance; some companies, for example, being confined to the transportation of passengers only, and the use of horse power as a motor, while others were permitted to carry freight as well as persons, and also to use steam as a motive power." An inspection of some of the numerous charters for this kind of roads, granted about the years 1857 to 1860, will show the greatest possible variety of conditions annexed to the grant of corporate powers in different charters. There being then no specific definition of the term "passenger railway," either prescribed by statute or existing in the common understanding, it follows that no necessary inference of a restricted franchise flows from the use of the term in the title of an act. In the case of Allegheny Co. Home's Appeal, 77 Pa. St. 77, we said: "It will not do therefore to impale the legislation of the state upon the sharp points of criticism, but we must give each title as it comes before us a reasonable interpretation, *ut res magis valeat quam pereat*. If the title fairly gives notice of the subject of the act so as reasonably to lead to an inquiry into the body of the bill it is all that is necessary. It need not be an index to the contents, as has often been said."

The title to the present act of incorporation gave notice that a company bearing the name of the "Lawrenceville & Evergreen Passenger Railway Company" was to be incorporated. It was only the name of the company, and not its purpose or object, that was described. The term "railway" and "railroad" company have no different signification. They are defined synonymously in the dictionaries, and are used in the same sense in the common language of men. In the general law of 23d May, 1878, (P. L. 111,) authorizing the incorporation of street railway companies, the term "railway" and "railroad" are used indiscriminately, as representing the same thing. Thus, in the title it is "railway" companies that are mentioned. In the second section it is provided that \$2,000 of stock for every mile of "railroad" shall be subscribed. The sixth section provides that the president and directors of any "railroad" company organized under the act shall have power to borrow money. The seventh section directs notice to be given for

Sufficiency of
title of act.

payment of installments by publication in one or more newspapers published in the county where such "railroad" shall be located. This form of expression is repeated in the twelfth section, and in the thirteenth the corporation created under the act is called "railroad corporation." In the fifteenth section it is referred to as a "passenger railway company," and in the sixteenth as "street passenger railway," where the structure itself is described. It is perfectly clear, therefore, that in the legislative sense these several modes of expression are used to designate the same thing. So far as the judicial sense of the community of meaning of these terms is concerned, it is strongly expressed in the case of *Hestonville, M. & F. Pass. R. Co., v. Philadelphia*, 89 Pa. St. 210, in which we expressly held that city passenger railways were included within the term "railroads," employed in the act of May 16, 1861, and that the provisions of said act relating to merger apply to said railways. The act of 1861 is entitled "An act relating to railroad companies." It was argued there, as now, that this title did not embrace street passenger railway companies, and hence there could be no merger of such under the provisions of the act. But we held differently. Mr. Justice TRUNKEY, in delivering the opinion of this court, said: "In 1861 all railroads were incorporated by special laws, and, in so far as each law did not prescribe specially, reference was made to the provisions of the act of February 19, 1849. This was common in charters for passenger railroads as well as others. In the statutes one class was generally styled 'railroads,' and the other more frequently, but not always, 'railways.' These words are popularly used as synonymous, and Webster defines both alike; but this matters little. A slight examination will show that the legislature did not use the words in a distinctive sense." After referring to several charters which combine both classes of roads into one corporation, the opinion proceeds: "These instances sufficiently indicate that the legislature indiscriminately used the words in their popular sense. It is true that railroads were used in the country prior to their use on the streets of towns, and that many differences necessarily exist in their regulation and management. It is useless to name points of likeness and unlikeness, for there are many of each. And these vary in the same road when one part is in the country and the other in a city. Recently narrow-gauge railways have been introduced, not laid on streets of cities, nor tunnelled through hills and mountains, but running over the latter. All three kinds are railways,—are railroads. Then, as respects the title of the act of 1861, it embraces railways on streets as well as those through or over hills and mountains.

The foregoing expressions must be regarded as qualifying certain remarks contained in the opinion of this court in the case of *Com. v. Central Pass. R.*, 52 Pa. St. 506, in which a distinction between passenger railway companies and railroads generally was apparently asserted, of such a character as that legislation intended for one class could not or would not embrace the other. We say "apparently," because such was not the real meaning of the court, as the learned counsel for the appellant seems to think. Our Brother STRONG, who delivered the opinion, was simply interpreting the actual charter of a passenger railway company, in which there was nothing that gave it the right to use steam as a motor, or the right to carry freight as well as passengers, or, by consequence, the right to use the heavy high rails used on steam roads for running locomotives and heavy freight trains. All this was literally true, and those conclusions were strictly correct, but what was said on this subject was said exclusively with reference to the facts of that case, and, by way of illustration, the difference between the heavy rails, which rise several inches above the surface of the street, and do constitute a material obstruction to the travel, and the rail in ordinary use in passenger roads, was selected and emphasized, but that was all. It was never intended to say or to intimate that there might not be different kinds of rails for passenger railway tracks, or that one kind of rail might not be used, even though it were in a slight degree more obstructive than another, if in other respects it were suitable rail for such use. We think the learned counsel for the appellant overestimated the meaning of the language quoted in their argument from the opinion in the case referred to. If, now, we turn to the language of the act of incorporation of the appellees in this case, we find it does, in the most express and emphatic manner, confer upon the appellees the right to use steam as a motive power, on and over any part of their road outside the limits of the city of Pittsburgh, and within those limits if certain consents are obtained. We find, also, that express power is given to carry freight as well as passengers over the road, and to construct such turnouts and switches as may be necessary and pass over and across any other railroad at grade. In all these respects the grant of powers differs from that of the Central Passenger Railway Company, and it is seen at once that there is an absence of analogy between that case and the present. It is true that in this case, as in that, there is no provision as to the kind of rails that may be used, but as the powers conferred are those of steam railroads, both as to the motive force and the kind of traffic to be transported,

Common-
wealth v.
Central Pass.
R. Co. dis-
tinguished.

there is a perfectly legitimate inference that such rails may be used as are ordinarily used in the transportation of freight as well as passengers, in cars moved by steam power. No such inference was legitimate in the Central Passenger Railway Case, because there were no such powers expressly granted, and they could not be inferred from a charter which conferred only the power to carry passengers, and upon a passenger railway to be laid upon the streets of a city. It was therefore properly held that the right to lay a heavy T rail, such as is used on steam roads authorized to carry freight as well as passengers, did not exist. In the present case the road is authorized to be built in the country as well as in the city and town, and by the nearest practicable route between terminal points, with a right to occupy any public road then or thereafter to be opened, and, in this respect also, it differs from the Central Passenger Railway Case, and more nearly resembles the Hestonville, M. & F. Pass. R. Co.'s Case. We are clearly of opinion that the title of the act of 1871 sufficiently expresses a purpose to charter a railroad company, and that there is nothing contrary to the constitution in the text of the law.

But the supplement of 1872 is also attacked for a similar reason, because the title contains no reference to the subject matter of the act other than by reference to the title of the principal act. But the answer to this objection is that the rule governing such cases is "that, where the legislation in the supplement is germane to the subject of the original bill, the object of such supplement is sufficiently expressed in the title." *State Line & I. R. Co.'s Appeal*, 77 Pa. St. 431. This makes it necessary to consider only the character of the legislation contained in the supplement. That legislation is all contained in two sections, the first of which authorizes the company by name to extend its road to the coal fields of Butler county, and the second confers upon the company all the powers and privileges of the act of February 19, 1849. All this relates to the Lawrenceville & Evergreen Passenger Railway Company, and as that is the name of the company chartered by the act of 1871, to which it is expressly declared to be a supplement, and as the powers conferred are properly those which pertain to railroad companies, it cannot be doubted that the legislation of the supplement is germane to the subject of the original act of 1871. In the case of *Craig v. First Presbyterian Church*, 88 Pa. St. 42, we held that when an act of assembly is entitled a supplement to a former act, and the subject thereof is germane to the subject of the original act, its subject is sufficiently expressed to meet the requirements of article 3, § 3,

Title of amendatory act.

of the constitution. In view of these considerations and decisions, we are clearly of opinion that both the act of 1871 and the supplement of 1872 are lawful exercises of the legislative power not prohibited by the constitution.

It only remains to consider whether the matters complained of in the bill are authorized by the charter and its supplement. These matters are the construction of the road itself as a steam railroad, the change of gauge from a narrow gauge to the full width of the ordinary steam railway, and the proposed extension of the road beyond its original limits. The road was built and run as a narrow gauge steam railroad upon certain streets of the borough of Millvale for a number of years prior to the filing of the present bill. A former bill for an injunction to restrain the construction of the road seems to have been filed and proceeded with to a final decision favorable to the company and adverse to the borough. From that decision it seems no appeal was taken, and the occasion of the present bill appears to be the proposed widening of the gauge and extension of the road under the authority of the supplement. As the authority to use steam as a motive power, and to carry freight as well as passengers, is clearly given by the charter, we think there is no merit in the objection to the right of the company to construct and maintain the steam railroad which it has built and operated thus far. In point of fact, the defendant company has only exercised the powers expressly given to it when it made use of steam as a motor, and when it carried freight as well as passengers. These powers carry with them the right to construct and to use the appliances ordinarily employed for those purposes. It is true no express power is given to use locomotive engines, or the heavy passenger and freight cars commonly used for the carriage of freight and passengers, nor is any express authority given to lay the T rails, which are also in common use on steam railroads. But as these are the methods which experience has established as appropriate, and indeed essential, in the carriage of freight and passengers upon railroads or railways with steam as the motive power, they must be regarded as authorized by plain implication from the grant of the powers in question.

Authority to construct and operate steam road.

It is argued with much earnestness and force by the learned counsel for the appellant, that "corporate franchises can only be plainly and unequivocally conferred, and, where doubt exists as to the powers claimed by a corporation against the public, the construction is most strongly against the corporation in favor of the public." In support of this contention the custom-

Inference in charter powers of corporations.

ary citations are submitted in the paper book from *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339; that "a doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation," and, "if you assert that a corporation had certain privileges, show us the words of the legislature conferring them." Other citations from that and other cases are also presented. They are entirely correct, and when appropriate, they are of controlling force. But they must not be misused. That each individual act done or proposed to be done by a corporation must be authorized by the express letter of its charter is sheer nonsense. Powers are conferred, and, of course, there must be no doubt as to them, but the means of carrying those powers into operation follow the grant of the powers, and do not require express mention. Take the present case as an illustration. The right to use steam as a motive power is expressly given, but no power is given to use locomotive engines. Nevertheless it is too plain for argument that the right to use locomotive engines undoubtedly exists under the defendant's charter; for the right to carry freight and passengers over a railroad or railway is given, and to use steam as a motive power, and in order to exercise that right with that motive power, locomotive engines are essential, probably indispensable. So, too, the right to lay a T rail for such a railroad, while not expressly given, and while it is an obstruction to travel, is equally clear because they are in common use for such railroads. Yet it may be, perhaps is, possible to carry both freight and passengers over a flat rail bolted to longitudinal stringers, or the ordinary flange rail used on street passenger railroads. But that possibility will not take away the right to use the more obstructive rail, because the latter is the one in general use for the exercise of the power which is conferred by the letter of the statute. It is true, also, that in the title of the defendant's charter it is named as a "passenger railway company," and an inference is sought to be drawn that its powers of carriage must be subordinated or limited to those ordinarily exercised by that kind of companies. This would be certainly so if there were no other powers expressly conferred, but, as such other powers are expressly conferred, they necessarily carry with them all the customary modes in which such powers are exercised. So, too, it is urged that there was no power to change the gauge of the road from a narrow gauge of three feet to the wider one in ordinary use. But, as all the powers conferred upon railroad companies generally by the act of February 19, 1849, are extended to the defendant company by the second section of its sup-

Authority
to change
gauge.

plement, there is no force in the contention. There is no limit to the gauge of this company's road in the charter or supplement, and they would necessarily have the same right to adopt any gauge in ordinary use, or that they might desire, which any railroad company would have under the general railroad law of the state. If it be said that the defendant adopted the narrow gauge at the time its road was built, and has used it ever since until now, as is alleged in the bill, the reply is at once manifest, that it is not at all concluded by such original adoption and continuous use. It parted with no right thereby to make any change in the gauge of its track or the character of its rail which its own interests or the advance in the science of railroad building might suggest, always, of course, within the limits of its chartered rights. It might as well be argued against the proposed change of gauge that because a particular kind of rail was in vogue, and was actually adopted and used by a railroad company at and after the time of the construction of its road, it could never adopt another, but was concluded by its first device, upon the theory of an exhaustion of its power. It will be seen at once that such an argument is entirely fallacious and untenable. Instead of such being the law, we have always held that railroad companies not only have the right, but are by law bound, to make use of the latest and best inventions and appliances tending to promote the comfort and safety of the public. This is notably the case in the matter of spark arresters, and is equally applicable to couplings and other contrivances. The writer remembers when strap rails, laid upon longitudinal stringers and fastened down with spikes, were in common use on steam railroads, and he also remembers that snake heads at the ends of the rails resulted from this method, occasioning frequent accidents and loss of life. When the T rails came into use it became the undoubted legal duty of the old companies to abandon the flat rail, and use the new one, and any company failing to perform this duty would very quickly have received forcible and emphatic admonition to that effect both from juries and courts.

It is also alleged in the plaintiff's bill that all the acts of the defendant, both in laying its original track and in operating the same, and now in the proposed change of gauge and extension of its road, were and are done without the consent of the plaintiff, and against its earnest protest, and that the construction and operation of the road upon the streets of the borough is a great public nuisance, and dangerous to the lives of the citizens, and a hindrance to business on the streets. Of course if, by the terms of the charter, it was necessary to obtain the con-

Consent of
borough
authorities.

sent of the borough authorities to construct and operate the road of the defendant upon the streets of the borough, this point would be well taken, and would prevail. But no rule is better settled than that the power of the commonwealth over the streets and roads within its territory, including those of its cities and towns, is paramount to that of the local authorities, and that right, when granted to a railroad company, is altogether independent of the municipality within which it is to be exercised. Said BLACK, C. J., in *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 354: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. * * * If such conversion of a public street to purposes for which it was not originally designed does operate severely upon a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. * * * The right of a company, therefore to build a railroad on the street of a city, depends, like the lawfulness of all its other acts, upon the terms of its charter. Of course, when the power is given in express words there can be no dispute about it. It may also be given by implication." In the leading case upon this subject, (*In re Philadelphia & I. R. Co.*, 6 Whart. (Pa.) 25,) GIBSON, C. J., said: "It would be strange, therefore, were the streets of an incorporated town not public highways, subject perhaps to corporate regulation for purposes of grading, curbing, and paving, but subject also to the paramount authority of the legislature in the regulation of their use by carriages, rail-cars, or means of locomotion yet to be invented, and this without distinction between the inhabitants and their fellow citizens elsewhere." In *Williamsport Pass. R. Co.'s Appeal*, 120 Pa. St. 1, the present chief justice said: "It is not denied that the charter of the appellant's company gives it the power to lay its tracks upon the streets in question, and, if it were denied, it would not matter, as such power is expressly conferred. * * * There is nothing in the company's charter which makes the consent of councils a prerequisite to the exercise of its corporate powers in the extension of its road," and we therefore held that the company was at liberty to extend its road without obtaining such consent. In the present case the right to lay the track upon any public road then opened, or thereafter to be opened, is expressly given, without any qualification, and hence the consent of the borough of Millvale to the construction and operation of the road over its streets need not be obtained, and is a matter of indifference. But the charter does require that in order to cross the Ewalt Street bridge the con-

sent of the bridge company must be obtained, and the right to use steam power in the city of Pittsburgh also requires the consent of the bridge company, a majority of the property owners on Ewalt street, and the councils of the city. The necessity of obtaining consent in these special instances intensifies the force of the proposition that consent is unnecessary for all the other purposes of the defendant in the exercise of its franchise. This being so, it will be seen at once that the borough has no control over the construction or operation of the road within its limits. The power of the defendant in the exercise of its franchise is altogether independent of the borough, and is of just as high and authoritative origin as the right of the borough to exist at all. The rights of both are derived from the same source, to wit, the legislative power of the commonwealth, and the company is not subject to the slightest obligation to go to the borough for consent to exercise any part of its corporate franchise. Any other doctrine would subordinate the corporate franchise of the defendant to the will of the borough councils, and cannot be sanctioned for a moment. Upon a careful consideration of the merits of the case, we are persuaded that there was no error in the action of the learned court below, and we must therefore sustain its decree.

Decree affirmed, and appeal dismissed, at the appellant's cost.

Construction of Street Railway with T rails—Removal by City.—See appeal of Easton, S. E. & N. E. Pass. R. Co. (Pa.), 43 Am. & Eng. R. Cas. 253.

"Railroad" and "Railway" as Synonymous Terms—Constitutional Provision Forbidding Consolidation of "Railroads" not Applicable to Street Railways.—This was decided by the supreme court of Pennsylvania in the case of *Gyger v. Philadelphia City Pass. R. Co.* (Appeal of Montgomery), 136 Pa. St. 96. GREEN, J., said: "It is undoubtedly true, as we have several times decided, that the words 'railroad' and 'railway' are synonymous, and in all ordinary circumstances they are to be treated as without distinction of meaning. When either one or the other of these words is used in a statute, and the context requires that a particular kind of road is intended, that kind of road will be held to be the subject of the statutory provision; but if the context contains no such indication, and either of the words is used in describing the subject matter, the statute will be held applicable to every species of road which is embraced within the general sense of the word used. All of this was decided in the case of *Hestonville, etc., R. Co. v. City of Philadelphia*, 89 Pa. St. 210, where we held that the act of May 16, 1861, (P. L. 702,) entitled 'An act relating to railroad companies,' and authorizing the consolidation and merger of railroad companies as well as steam railroad companies. The reasoning of the opinion was principally upon the proposition that the expressions 'railroad' and 'railway' were in fact synonymous terms, and that there was nothing in the context of the act inconsistent with the application of the word 'railroad' to a street passenger road. It was conclusively shown in the opinion that the legislature was in the constant habit of using both words indiscriminately

as expressing the same thing. No necessary inference is therefore to be drawn from the mere use of either word that a limited class of roads was intended. It follows that we must search the context of the seventeenth article of the constitution in order to ascertain in what sense the word 'railroad' was used in the fourth section. It is the contention of the appellant that the prohibition of the section against the amalgamation of competing roads applies to street passenger railroad companies as well as to those of steam roads: and, if this contention is unsound, the appellant has no case. The title of the article is 'Railroads and Canals.' This is, of course, sufficiently comprehensive to embrace all classes of railroads or railways, and we accordingly find that a number of the sections are applied to steam railroad companies exclusively, and at least one section, the ninth, is applied exclusively to street passenger railway companies. The first section provides that all railroads and canals shall be public highways; that any association organized for the purpose shall have the right to construct a railroad between any points within the state, and to connect at the state line with railroads of other states; and that every railroad company shall have the right to intersect, connect with, or cross any other railroad and shall receive and transport, each, the other's passengers, tonnage, and cars without delay. It must be conceded at once that this section cannot possibly apply to street passenger railway companies, as all its provisions are utterly hostile to such a thought. Section third provides that all individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no unreasonable discriminations shall be made in charges for, or in facilities for, transportation of freight or passengers within this state, or crossing from, or going to, any other state. It is equally certain that this section also cannot embrace passenger railway companies, since such companies are, as a rule, though not always, without authority to carry freight, and do not extend to state lines. The fifth section is also inapplicable to street railroad companies, because it imposes disabilities upon carrying companies against engaging in mining or manufacturing articles for transportation over their roads, and, as street passenger companies do not transport articles of manufacture over their roads as a regular business, they are not included within the manifest meaning of the section. The same remarks apply to the sixth section, which imposes the same disabilities upon officers as are imposed by the fifth section upon the companies themselves. The seventh section plainly relates to the transportation of merchandise or freights, and hence is equally inapplicable to street passenger companies. The eighth section prohibits any railroad, railway, or other transportation company, from granting free passes to any persons but officers and employees. This section relates to the carriage of passengers only, and it plainly includes street passenger companies as well as all others, because it expressly mentions 'railroad' and 'railway' companies. But because it uses both terms 'railroad' and 'railway' a most convincing argument arises that the convention considered it necessary to use both in order to embrace both, and hence it must be considered they did not intend to include both in the other sections where only one is used. The force of this argument is greatly strengthened when we consider the ninth section, which provides that 'no street passenger railway shall be constructed within the limits of any city, borough, or township, without the consent of its local authorities.' It is perfectly clear that the convention did not regard the word 'railroad' as synonymous with 'railway' or 'street' passenger railway, when this section of the article was framed. It is equally conclusive that they were perfectly conscious of the difference between the two classes of roads, and that when they intended to make provisions respecting 'street passenger railways,' they considered it necessary to use this kind of phraseology in order to designate them. Can the

courts do any less? Can we attribute to them any other meaning than the one they have, by well chosen words, clearly expressed, when they desired to make provision for this particular class of roads? Are we at liberty to infer, in considering the fourth section, where they made a provision as to railroad and canal companies, that they intended by that mode of description to designate 'street passenger railway companies' as well? We think not. Having a full knowledge of the precise manner in which they considered it necessary to express themselves when they desired to provide for 'street passenger railway companies,' we find that in the fourth section they entirely abstain from that mode of expression, or from any similar phraseology. We must conclude that the reason for such abstention was that they did not intend to include them in the prohibition of the fourth section. This is the obvious and natural conclusion to reach, and we know of no reason why we should not regard it, and be governed by it. If we consider the subject matter of the fourth section, we are strengthened in the correctness of this conclusion. It provides that no railroad, canal, or other transportation company, or the lessees, purchasers, or managers of any railroad or canal corporation, shall consolidate the stock, property, or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning, or having under its control, a parallel or competing line.

"The subjects of the prohibition are railroad and canal companies. They are classed together as the subjects of a prohibition common to both. Railroads and canals are means of transportation which relate to and cover the territory of the state. In their ordinary understanding by the people they are regarded as methods of carriage of freights and passengers—most largely of freights—between distant points within the state, and to the borders of the state, so as to connect with other similar systems of transportation without the state to still more remote points. It would be a most strained and unreasonable conclusion to hold that the constitutional convention, when it plainly, and for wise reasons, prohibited the amalgamation of railroads and canals of this character, and parallel or competing with each other, had any possible reference to the mere passenger travel over the streets of cities and towns. There is nothing in the section or in article 17 itself indicating that the convention had any such thought or any such purpose. There is no argument in support of such a theory except that which is based upon the generality of the word 'railroad;' but it has been already seen that there is no necessary, essential force in that argument considered by itself alone; that it is always subject to the effect of the context when considered in connection; and that upon such a consideration in this particular case it falls to the ground. We think also that it is quite clear that the sense of 'competing,' which is the essential sense of the prohibition, is not applicable to the travel upon the streets of cities and towns over passenger railways. The competition by traffic between distant points by rival roads and canals tends to promote cheap transportation, and thereby tends to the public good; but, if this is suppressed by the absorption of one of the competing lines by the other, the wholesome competition ceases and higher rates soon result. This is the evil which was sought to be prevented by the fourth section of the seventeenth article. It will be seen at once that it is inapplicable to the travel upon streets of cities and towns on passenger railways. The travel over parallel streets is not necessarily a competing travel. Each street has travel of its own which is conducted upon its own railway. That travel may be almost entirely conducted without competition with the travel upon another, though parallel, street; nor do railways upon parallel streets have the same termini. Many of them, though running upon parallel streets for a considerable distance, diverge altogether from such a course at their

extremities. Two roads would be competing if laid upon the same street, and running in the same direction, but that is not this case, and probably is not the case anywhere in the state. Moreover, no freight is carried upon passenger railways, and it is the carriage of freight that was probably of principal importance in the design of the fourth article. All the analogies which would liken the traffic upon the streets railways with that upon the railroads and canals of the state are wanting, and hence we are without authority to impose upon the language of the fourth article a meaning which does not reside in its words, and which does not result by any rational implication. The language used in the fourth section in designating the objects of its provisions is precisely the same as is used in all the other sections for the same purpose; and when passenger railways are intended to be indicated a different phraseology is employed. We find nothing in the fourth section indicating that the word 'railroad' was there used in any other sense than that in which it was manifestly used in the other sections; and we are therefore not at liberty to give it any other meaning than is apparent in those sections. We think the court below was right in dismissing the plaintiff's bill. The decree of the court below is affirmed, and the bill of the plaintiff is dismissed at the cost of the appellant.

STERRETT, J., dissented."

Pleading—"Railroad Co." for "Railway Co."—In *East Tenn., Va. & Ga. R. Co. v. Mahoney* (Tenn.), 15 S. W. Rep. 652, it was held that after a trial upon the merits, a declaration against the defendant "Railroad Co." may be amended so as to read "Railway Co." See also, *Central & M. R. Co. v. Morris* (Tex.), 28 Am. & Eng. R. Cas. 50; *Chicago, etc., R. Co. v. Johnson*, 13 *Id.* 181.

Right to Build Branch Railroad in Street—Decree in Partition—Coal Lands.—In partition proceedings the parties agree that the allottees of certain coal land which had connected with it a coal railroad should have the right to maintain branch railroads from the former coal railroad along certain streets laid out on other portions of the land, and a decree was entered in accordance therewith, but no attempt to build branch roads was made for 48 years, during which time the coal had been exhausted. *Held*, that the allottees of the coal land have no right to build such branch roads for general railroad purposes. *Republic Iron Works v. Burgwin* (Pa., March 9, 1891), 21 Atl. Rep. 386.

PURIFOY

v.

RICHMOND & DANVILLE R. CO.

(*North Carolina Supreme Court, February 16, 1891.*)

Junction of Railroads—"At" a City—Practicable Point.—When a railroad is empowered to connect with another railroad "at the city of Charlotte, at the point which may be found most practicable," and the connection is made at a point 1,000 yards outside the city limits, but at the most practicable point, this is within the charter. "At" does not necessarily mean "in" the city.

Same—Option to Connect with Either of Two Roads—Location of Line.—When authority is given to connect with the C. & S. C. R. R., or with the N. C. R. R., at Charlotte, and the railroad locates its line, and proceeds to construct it to a junction with the N. C. R. R., but a few months before its completion to the latter point crosses another railroad which connects with

the C. & S. R. R., and, by permission of this latter railroad, it runs its cars temporarily over it to the C. & S. C. R. R., (laying down a third rail, by reason of difference in gauge,) this is not a "construction of its railroad to a junction with the C. & S. C. R. R., which deprives it of its election to connect with the N. C. R. R.

Filing Map of Route.—Where the railroad was completed through the *locus in quo* prior to the act of 1872, (Code, § 1952,) it was not necessary to the validity of the location that a map of the route should be filed.

Title to Right of Way—Completion of Track.—When the charter provides that in the absence of any contract the corporation acquires title to 100 feet on each side of the track, and, if no claim for damages is brought in two years from the completion of that part of the road, it is barred, the corporation has a valid title to the right of way as its track is completed.

Same—Loss by Lapse of Time.—The title of the railroad to the right of way once acquired cannot be lost by occupancy as to any part of it by the lapse of time. Code, § 150.

APPEAL from Superior Court, Mecklenburg County.

Dowd & Son, for appellant.

D. Schenck and *G. F. Bason*, for appellee.

CLARK, J.—Acts Sp. Sess. 1868, chap. 8, incorporated the Air Line Railroad of South Carolina, and authorized it "to construct, equip, and operate its road within the limits of this state from any point on the South Carolina line to such point on the Charlotte & South Carolina Railroad or the North Carolina Railroad at Charlotte as shall be found most practicable," and gave the company "all the rights, powers, and privileges conferred on the Charlotte & South Carolina Railroad by chapter 84, Acts 1846-47." Sections 25 and 27 of this last act give the corporation a right of way of 100 feet on each side of the center of the roadbed, reserving to the owners the right to apply for an assessment of damages within two years from the completion of that part of the road, and, if application is not made within that time, the claim is barred. By a succession of charters and conveyances, all of which were in evidence and are set out in the record, the rights conferred by aforesaid charter of 1868 have been transferred to and are vested in the Atlanta & Charlotte Air Line Railroad Company, the principal defendant. The plaintiff sues in ejectment to recover land occupied by the track of defendant Atlanta & Charlotte Air Line Railroad, and damages for use and occupation. The *locus in quo* lies east of the Atlanta & Charlotte Air Line Railroad Trade Street Depot, in Charlotte, and between said depot and the junction of the Atlanta & Charlotte Air Line Railroad with the North Carolina Railroad, which last point is 1,000 yards east of the city limits of Charlotte. The plaintiff's entire tract lies within the 100 feet from the center of the track of the defendant Atlanta & Charlotte Air Line Railroad Company, and said company in its answer, by way of counterclaim, sought

to recover possession of the whole of said lot. Two sets of issues were submitted by the court, one as to plaintiff's right to recover the land covered by the roadbed and damages, the other as to defendant's right to recover the whole tract, it being within the 100 feet. There was no conflict of evidence, and the court instructed the jury that they should return a verdict in favor of the defendant upon all the issues, and it was so entered. The plaintiff excepted to such direction, and to the judgment, and appealed. The plaintiff contends:

1. That the Atlanta & Charlotte Air Line Railroad Company, having elected to construct its road to a junction with the Charlotte & South Carolina Railroad, could not afterwards change it to connect with the North Carolina Railroad, and asked the court so to charge.

Junction of
roads—Loca-
tion of line.

But the evidence did not support this view. There was no evidence that the Atlanta & Charlotte Air Line Railroad Company ever located its line or constructed its road to a junction with the Charlotte & South Carolina Railroad. The evidence is that in 1871, when the Atlanta & Charlotte Air Line Railroad Company had completed its road to its Trade Street Depot, at the north end of Charlotte, and further northeastward through the *locus in quo*, it found the Atlantic, Tennessee & Ohio Railroad running from that point round the southwest side of Charlotte to the Charlotte & South Carolina Railroad, and, by consent of the Atlantic, Tennessee & Ohio Railroad, it used its track temporarily some eight months to transfer its freight and passengers, laying down a third rail on the Atlantic, Tennessee & Ohio Railroad, owing to the difference in gauge. In the meantime the Atlanta & Charlotte Air Line Railroad Company was prosecuting the construction of its line as located, and for which it had bought rights of way straightforward to their connection with the North Carolina Railroad on the northeast side of Charlotte, to which point it was completed prior to August, 1872. The evidence shows no construction of the Atlanta & Charlotte Air Line Railroad to the Charlotte & South Carolina Railroad, but a mere temporary connection over another railroad, and to make which the Atlanta & Charlotte Air Line Railroad Company had to run backwards and over a part of its own line. Its natural connection was from the Trade Street Depot straightforward to the North Carolina Railroad, and the evidence is that it had located and at that very time was prosecuting the construction of its line to its junction with the North Carolina Railroad, to which point it was completed eight months later. Besides, as the evidence is uncontradicted that when this temporary connection was had over the

Atlantic, Tennessee & Ohio Railroad, the Atlanta & Charlotte Air Line Railroad Company had already completed its track through the *locus in quo*, we do not see how the plaintiff could be affected if its contention that there had since been a change of the terminus was sound, for, before going to either terminus, the track of the Atlanta & Charlotte Air Line Railroad had been built through this land, and title to the 100 feet on either side acquired by virtue of its charter, and such track has been continuously used ever since.

2. The plaintiff further contends that the charter authorized a connection with the North Carolina Railroad at Charlotte, and that this is not done by the present connection which is at a point 1,000 yards east of Charlotte. Possibly this point might have been raised by the owner of land sought to be condemned at the junction outside of the city limits, but we cannot see how it can avail the plaintiff through whose land the track ran any more than any other landowner along its whole line, for, after passing through plaintiff's land, the connection could still have been made either within or without the city limits. Nor do we concur in plaintiff's view that the authority to make the connection "at such point on the North Carolina Railroad at Charlotte as shall be found most practicable" necessarily required the connection to be made in the city. The phraseology imports some discretion, and the evidence was that the location, as selected, was the best according to the surveyor's report, and cost \$80,000 less than any other would have done. The Atlanta & Charlotte Air Line Railroad is 272 miles long, and authority to connect with the North Carolina Railroad at Charlotte at the most practicable point is surely not transgressed when the most practicable point is half a mile from the city limits. "At" is defined by Webster to express, primarily, "nearness in place or time. At the house may be in or near the house." In Parke's Appeal, 64 Pa. St. 137, where a railroad 24 miles long was chartered from a point "at or near Parkersburg," it was held that a connection $1\frac{1}{2}$ miles east of Parkersburg was not a transgression of the act. To same purport is O'Neal v. King, 3 Jones (N. Car.), 517. But we need not cite further authorities.

3. The plaintiff further contends that the location was invalid because no map of the route was filed, as required by the act of 1872. Code, § 1952. But prior to the passage of that act, the Atlanta & Charlotte Air Line Railroad had been constructed through the *locus in quo*, and the filing of a map was therefore not required. It was in evidence, and not contradicted, that the Atlanta & Charlotte Air Line Railroad was constructed through the

Connection
"at"
Charlotte.

Filing map of
route.

locus in quo in 1871. This gave it a title to 100 feet on each side from the center of the track, and no statute of limitations runs against the railroad by reason of the occupancy of the right of way. Code, § 150; Carolina Cent. R. Co. v. McCaskill, 94 N. Car. 746, 25 Am. & Eng. R. Cas. 83. The plaintiff did not buy the land till 1874, three years after the railroad was completed, and when he was put thereby on inquiry. He did not obtain a deed covering the part he sues for till 1881, and no demand was made till 1889, 18 years after the construction of the railroad. Upon the evidence, the defendant was entitled to recover possession of the land upon his counterclaim. Whether the plaintiff is entitled to allowance for betterments upon the facts under Code, § 473; Carolina Cent. R. Co. v. McCaskill, 98 N. Car. 526,—is a matter which is not before us. In the view we have taken of the case, the other exceptions noted by plaintiff become immaterial, and need not be adverted to. There being no conflict of evidence, there was nothing for the jury to pass upon. His honor properly, it being a civil action, directed the verdict to be entered.

PER CURIAM.—No error.

PULLMAN'S PALACE CAR CO.

v.

PENNSYLVANIA.

(*United States Supreme Court, May 11, 1891.*)

Taxation of Sleeping Cars—Constitutional Law—Interstate Commerce.—A state may tax the cars of a foreign sleeping car company employed in interstate commerce and which run into, through and out of such state, and may ascertain the proportion of the property of such company upon which the tax should be placed by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it runs cars within the state bears to the whole number of miles in that and other states over which its cars are run. An act imposing such a tax is a valid and constitutional law.

BRADLEY, FIELD, and HARLAN, JJ., dissenting.

IN ERROR to the Supreme Court of the State of Pennsylvania.

This was an action brought by the state of Pennsylvania against Pullman's Palace Car Company, a corporation of Illinois, in the court of common pleas of the county of Dauphin in the state of Pennsylvania, to recover the amount of a tax settled by the auditor general and approved by the treasurer of that state for the years 1870 to 1880, inclusive, on the de-

defendant's capital stock, taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which cars were run by the defendant in Pennsylvania bore to the whole number of miles in this and other states over which its cars were run. All these taxes were levied under successive statutes of Pennsylvania, imposing taxes on capital stock of corporations incorporated by the laws of Pennsylvania or of any other state, and doing business in Pennsylvania, computed on a certain percentage of dividends made or declared. The taxes for 1870-1874 were levied under the statute of May 1, 1868, No. 69, § 5, which applied to corporations of every kind, with certain exceptions not material to this case: and fixed the amount of the tax at half a mill on every 1 per cent. of dividend. P. L. 1868, p. 109. The taxes for 1875-1877 were levied under the statute of April 24, 1874, No. 31, § 4, which applied to all corporations in any way engaged in the transportation of freight or passengers, and fixed the tax at nine-tenths of a mill on every 1 per cent. of dividend. P. L. 1874, p. 70. The taxes for 1878-1880 were levied under the statutes of March 20, 1877, No. 5, § 3, and of June 7, 1879, No. 122, § 4, applicable to all corporations, except building associations, banks, savings institutions, and foreign insurance companies, and fixing the tax at half a mill on each 1 per cent. of dividend of 6 per cent. or more on the par value of the capital stock, and, when the dividend was less, at three mills on a valuation of the capital stock. P. L. 1877, p. 8; P. L. 1879, p. 114.

A trial by jury was waived, and the case submitted to the decision of the court, which found the following facts: "The defendant is a corporation of the state of Illinois, having its principal office in Chicago. Its business was, during all the time for which tax is charged, to furnish sleeping coaches and parlor and dining room cars to the various railroad companies, with which it contracted on the following terms: The defendant furnished the coaches and cars, and the railroad companies attached and made them part of their trains, no charge being made by either party against the other. The railroad companies collected the usual fare from passengers who travelled in their coaches and cars, and the defendant collected a separate charge for the use of the seats, sleeping berths, and other conveniences. Business has been carried on continuously by the defendant in this way in Pennsylvania since February 17, 1870, and it has had about 100 coaches and cars engaged in this way in the state during that time. The cars used in this state have, during all the time for which tax is charged, been running into, through, and out of this state." Upon these facts the court held "that the proportion of the

capital stock of the defendant invested and used in Pennsylvania is taxable under these acts; and that the amount of the tax may be properly ascertained by taking as a basis the proportion which the number of miles operated by the defendant in this state bears to the whole number of miles operated by it, without regard to the question whether any particular car or cars were used;" and therefore gave judgment for the state. That judgment was affirmed upon writ of error by the supreme court of the state, for reasons stated in its opinion as follows: "We think it very clear that the plaintiff in error is engaged in carrying on such a business within this commonwealth as to subject it to the statutes imposing taxation. While the tax on the capital stock of a company is a tax on its property and assets, yet the capital stock of a company and its property and assets are not identical. The coaches of the company are its property. They are operated within this state. They are daily passing from one end of the state to the other. They are used in performing the functions for which the corporation was created. The fact that they also are operated in other states cannot wholly exempt them from taxation here. It reduces the value of the property in this state, justly subject to taxation here. This was recognized in the court below, and we think the proportion was fixed according to a just and equitable rule." 107 Pa. St. 156, 160. Pullman's Palace Car Company sued out a writ of error from this court, and filed six assignments of error, the substance of which was summed up in the brief of its counsel as follows: "The court erred in holding that any part of the capital stock of the Pullman Company was subject to taxation by the state of Pennsylvania by reason of its running any of its cars into, out of, or through the state of Pennsylvania in the course of their employment in the interstate transportation of railway passengers."

Edward Isham, John S. Runnells, Wm. Burry, and M. E. Olmsted, for plaintiff in error.

W. S. Kirkpatrick and J. F. Sanderson, for the commonwealth.

GRAY, J.—Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the state is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the constitution of the United States granting to congress the power to regulate commerce among the several states. The plaintiff in error contends that its cars could be taxed only in the state of Illinois, in which it was incorporated, and had its principal place of business. No

Questions at issue.

general principles of law are better settled or more fundamental than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*,—the law of the place where the property is kept and used. *Green v. VanBuskirk*, 5 Wall. (U. S.), 307, and 7 Wall. (U. S.), 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 679; *Walworth v. Harris*, 129 U. S. 355; *Story, Confl. Laws*, § 550; *Whart. Confl. Laws*, §§ 297-311. As observed by Mr. Justice Story, in his commentaries just cited: "Although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there." For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax. *Lane Co. v. Oregon*, 7 Wall. (U. S.), 71, 77; *Cleveland, P. & A. R. Co. v. Pennsylvania*, 15 Wall. (U. S.), 300, 323, 324, 328; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.), 5, 29; *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.), 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517, 524, 11 Am. & Eng. Corp. Cas. 456; *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, 123. It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. *Delaware Railroad*

Power of
state as to
property
within its
limits.

Situs of
movables.

Taxation of
property en-
gaged in
interstate
commerce.

Tax, 18 Wall. (U. S.), 206, 232; Western Union Telegraph Co. *v.* Texas, 105 U. S. 460, 464; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 211, 13 Am. & Eng. Corp. Cas. 365. Western Union Telegraph Co. *v.* Attorney General, 125 U. S. 530, 549; Marye *v.* Baltimore & O. R. Co., 127 U. S. 117, 124; Leloup *v.* Mobile, 127 U. S. 640, 649, 21 Am. & Eng. Corp. Cas. 26. Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners, in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and therefore can be taxed only at their legal *situs*,—their home port, and the domicile of their owners. Hays *v.* Pacific Mail Steam-Ship Co., 17 How. 596; St. Louis *v.* Wiggins Ferry Co., 11 Wall. (U. S.), 423; Morgan *v.* Parham, 16 Wall. (U. S.), 471; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 3 Am. & Eng. Corp. Cas. 482; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365. Between ships and vessels, having their *situs* fixed by act of congress, and their course over navigable waters, and touching land only incidentally and temporarily, and cars or vehicles of any kind, having no *situs* so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different states is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with

Distinction
between
vessels and
cars.

transportation by land." *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.), 456, 470.

In *Gloucester Ferry Co. v. Pennsylvania*, on which the plaintiff in error much relies, the New Jersey corporation taxed by the state of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware river; and the difference in the facts of that case and of this and in the rules applicable was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided, always, it be within the jurisdiction of the state." 114 U. S. 206, 13 Am. & Eng. Corp. Cas. 365. "While it is conceded that the property in a state belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void as an interference with and an obstruction of the power of congress in the regulation of such commerce." 114 U. S. 211. Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. *Moran v. New Orleans*, 112 U. S. 69, 74, 5 Am. & Eng. Corp. Cas. 311; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, 43, 24 Am. & Eng. R. Cas. 511; *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 497, 16 Am. & Eng. Corp. Cas. 1; *Leloup v. Mobile*, 127 U. S. 640, 644, 21 Am. & Eng. Corp. Cas. 26. For the same reason, a tax upon gross receipts derived from the transportation of passengers and goods between one state and other states or foreign nations has been held to be invalid. *Fargo v. Michigan*, 121 U. S. 230, 31 Am. & Eng. R. Cas. 452; *Philadelphia & S. Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326, 18 Am. & Eng. R. Cas. 1.

The tax now in question is not a license tax or a privilege

46 A. & E. R. Cas.—16

*Ferry Co. v.
Pennsylvania*

Taxation for
privilege of
carrying on
interstate
commerce.

tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right of transit of persons or property through the state to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation on account of its property within the state is, in substance and effect, a tax on that property. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 209, 13 Am. & Eng. Corp. Cas. 365; *Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530, 552. This is not only admitted but insisted on, by the plaintiff in error.

Tax in ques-
tion is on
property.

The cars of this company within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory, and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the state could tax them, like other property within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the state to levy a tax upon them. The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the state, particular cars may not remain within the state; but the company has at all times substantially the same number of cars within the state, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about 100 cars within the state.

Cars in Penn-
sylvania tax-
able.

The mode which the state of Pennsylvania adopted to ascertain the proportion of the company's property upon which it should be taxed in that state was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the state bore to the whole number of miles in that and other states over which its cars were run. This was a just and equitable

method of assessment; and, if it were adopted by all the states through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. The validity of this mode of apportioning such a tax is sustained by several decisions of this court in cases which came up from the circuit courts of the United States, and in which, therefore, the jurisdiction of this court extended to the determination of the whole case, and was not limited, as upon writs of error to the state courts, to questions under the constitution and laws of the United States.

Mode of ascertaining proportion of property taxable.

In the State Railroad Tax Cases, 92 U. S. 575, it was adjudged that a statute of Illinois, by which a tax on the entire taxable property of a railroad corporation, including its rolling stock, capital, and franchise, was assessed by the state board of equalization, and was collected in each municipality in proportion to the length of the road within it, was lawful, and not in conflict with the constitution of the state; and Mr. Justice MILLER, delivering judgment, said: "Another objection to the system of taxation by the state is that the rolling stock, capital stock, and franchise are personal property, and that this, with all other personal property, has a local *situs* at the principal place of business of the corporation, and can be taxed by no other county, city, or town but the one where it is so situated. This objection is based upon the general rule of law that personal property, as to its *situs*, follows the domicile of its owner. It may be doubted very reasonably whether such a rule can be applied to a railroad corporation as between the different localities embraced by its line of road. But, after all, the rule is merely the law of the state which recognizes it; and when it is called into operation as to property located in one state and owned by a resident of another, it is a rule of comity in the former state rather than an absolute principle in all cases. *Green v. Van Buskirk*, 5 Wall. (U. S.), 312. Like all other laws of a state, it is therefore subject to legislative repeal, modification, or limitation; and when the legislature of Illinois declared that it should not prevail in assessing personal property of railroad companies for taxation, it simply exercised an ordinary function of legislation." 92 U. S. 607, 608. "It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies, according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes according to the length of the track, within its limits." "It may well be doubted whether any better mode of determining the value of that portion of the

State railroad tax cases.

track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each state, as the basis of taxation. *Delaware Railroad Tax*, 18 Wall. (U. S.), 206; *Baltimore & O. R. Co. v. Pennsylvania*, 21 Wall. (U. S.), 492." 92 U. S. 608, 611. So, in *Western Union Telegraph Co. v. Attorney General*, 125 U. S. 530; this court upheld the validity of a tax imposed by the state of Massachusetts upon the capital stock of a telegraph company, on account of property owned and used by it within the state, taking as the basis of assessment such proportion of the value of its capital stock as the length of its lines within the state bore to their entire length throughout the country.

Even more in point is the case of *Marye v. Baltimore & O. R. Co.*, 127 U. S. 117, in which the question was whether a railroad company incorporated by the state of Maryland, and no part of whose own railroad was within the state of Virginia, was taxable under general laws of Virginia upon rolling stock owned by the company and employed upon connecting railroads leased by it in that state, yet not assigned permanently to those roads, but used interchangeably upon them and upon roads in other states, as the company's necessities required. It was held not to be so taxable, solely because the tax laws of Virginia appeared upon their face to be limited to railroad corporations of that state; and Mr. Justice MATTHEWS, delivering the unanimous judgment of the court, said: "It is not denied, as it cannot be, that the state of Virginia has rightful power to levy and collect a tax upon such property used and found within its territorial limits as this property was used and found, if and whenever it may choose, by apt legislation, to exert its authority over the subject. It is quite true, as the *situs* of the Baltimore and Ohio Railroad Company is in the state of Maryland, that also, upon general principles, is the *situs* of all its personal property; but for purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the property may be brought and used by its owner by the law of the place where it is found. If the Baltimore and Ohio Railroad Company is permitted by the state of Virginia to bring into its territory, and there habitually to use and employ, a portion of its movable personal property, and the railroad company chooses so to do, it would

certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in the like way by its own citizens. And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisal and valuation of the average amount of the property thus habitually used, and collected by distraint upon any portion that might at any time be found. Of course, the lawfulness of a tax upon vehicles of transportation used by common carriers might have to be considered in particular instances with reference to its operation as a regulation of commerce among the states, but the mere fact that they were employed as vehicles of transportation in the interchange of interstate commerce would not render their taxation invalid." 127 U. S. 123, 124. For these reasons, and upon these authorities, the court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the states should concur in abandoning the legal fiction that personal property has its *situs* at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one state to another would escape taxation altogether. Judgment affirmed.

BROWN, J., not having been a member of the court when this case was argued, took no part in its decision.

BRADLEY, J., (with whom concurred FIELD and HARLAN, JJ., *dissenting*).—I dissent from the judgment of the court in this case, and will state briefly my reasons. I concede that all property, personal as well as real, within a state, and belonging there, may be taxed by the state. Of that there can be no doubt. But where property does not belong in the state, another question arises. It is the question of the jurisdiction of the state over the property. It is stated in the opinion of the court as a fundamental proposition on which the opinion really turns that all personal as well as real property within a state is subject to the laws thereof. I conceive that that proposition is not maintainable as a general and absolute proposition. Among independent nations, it is true, persons and property within the territory of a nation are subject to its laws, and it is responsible to other nations for

All personal property in state not subject to laws thereof.

any injustice it may do to the persons or property of such other nations. This is a rule of international law. But the states of this government are not independent nations. There is such a thing as a constitution of the United States, and there is such a thing as a government of the United States, and there are many things, and many persons, and many articles of property that a state cannot lay the weight of its finger upon, because it would be contrary to the constitution of the United States. Certainly property merely carried through a state cannot be taxed by the state. Such a tax would be a duty,—which a state cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New York for the purpose of being sold in New York, while in Pennsylvania it may be subject to the police regulations of the state, but it is not subject to taxation there. It is not generally subject to the laws of the state, as other property is. So if a train of cars starts at Cincinnati for New York, and passes through Pennsylvania, it may be subject to the police regulations of that state while within it, but it would be repugnant to the constitution of the United States to tax it. We have decided this very question in the Case of State Freight Tax, 15 Wall. (U. S.), 232. The point was directly raised and decided that property on its passage through a state in the course of interstate commerce cannot be taxed by the state, because taxation is incidentally regulation, and a state cannot regulate interstate commerce. The same doctrine was recognized in *Coe v. Errol*, 116 U. S. 517, 11 Am. & Eng. Corp. Cas. 456. And surely a state cannot interfere with the officers of the United States in the performance of their duties, whether acting under the judicial, military, postal, or revenue departments. They are entirely free from state control. So a citizen of the United States, or any other person, in the performance of any duty, or in the exercise of any privilege, under the constitution or laws of the United States is absolutely free from state control in relation to such matters. So that the general proposition that all persons and personal property within a state are subject to the laws of the state, unless materially modified, cannot be true. But when personal property is permanently located within a state for the purpose of ordinary use or sale, then, indeed, it is subject to the laws of the state and to the burdens of taxation, as well when owned by persons residing out of the state as when owned by persons residing in the state. It has then acquired a *situs* in the state where it is found. A man residing in New York may own a store, a factory, or a mine in Alabama, stocked

Property
passing
through a
state not
taxable

Situs of
personal
property.

with goods, utensils, or materials for sale or use in that state. There is no question that the *situs* of personal property so situated is in the state where it is found, and that it may be subjected to double taxation,—in the state of the owner's residence, as a part of the general mass of his estate; and in the state of its *situs*. Although this is a consequence which often bears hardly on the owner, yet it is too firmly sanctioned by the law to be disturbed, and no remedy seems to exist but a sense of equity and justice in the legislatures of the several states. The rule would undoubtedly be more just if it made the property taxable, like lands and real estate, only in the place where it is permanently situated. Personal as well as real property may have a *situs* of its own, independent of the owner's residence, even when employed in interstate or foreign commerce. An office or warehouse connected with a steamship line or with a continental railway may be provided with furniture and all the apparatus and appliances usual in such establishments. Such property would be subject to the *lex rei sitæ* and to local taxation, though solely devoted to the purposes of the business of those lines. But the ships that traverse the sea, and the cars that traverse the land, in those lines, being the vehicles of commerce, interstate or foreign, and intended for its movement from one state or country to another, and having no fixed or permanent *situs* or home except at the residence of the owner, cannot, without an invasion of the powers and duties of the federal government, be subjected to the burdens of taxation in the places where they only go or come in the transaction of their business, except where they belong. *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.), 596; *Morgan v. Parham*, 16 Wall. (U. S.), 471; *Wheeling P. & C. Transportation Co. v. Wheeling*, 99 U. S. 273. To contend that there is any difference between cars or trains of cars and ocean steamships in this regard is to lose sight of the essential qualities of things. This is a matter that does not depend upon the affirmative action of congress. The regulation of ships and vessels by act of congress does not make them the instruments of commerce. They would be equally so if no such affirmative regulations existed. For the states to interfere with them in either case would be to interfere with and to assume the exercise of that power which by the constitution has been surrendered by the states to the government of the United States, namely, the power to regulate commerce.

Reference is made in the opinion of the court to the case of *Baltimore R. Co. v. Maryland*, 21 Wall. (U. S.), 456, in which it was said that commerce on land between the different states is strikingly dissimilar in many respects from commerce

on water; but that was said in reference to the highways of transportation in the two cases, and the difference of control which the state has in one case from that which it can possibly have in the other. A railroad is laid on the soil of the state by virtue of authority granted by the state, and constantly subject to the police jurisdiction of the state; while the sea and navigable rivers are highways created by nature, and not subject to state control. The question in that case related to the power of the state over its own corporation, in reference to its rate of fares and the remuneration it was required to pay to the state for its franchises,—an entirely different question from that which arises in the present case. Reference is also made to expres-

sions used in the opinion in Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 106, 13 Am. & Eng. Corp. Cas. 356, which, standing alone, would seem to concede the right of a state to tax foreign corporations engaged in foreign or interstate commerce if such property is within the jurisdiction of the state. But the whole scope of that opinion is to show that neither the vehicles of commerce coming within the state nor the capital of such corporations is taxable there, but only the property having a *situs* there,—as the wharf used for landing passengers and freight. The entire series of decisions to that effect are cited and relied on. Of course I do not mean to say that either railroad cars or ships are to be free from taxation, but I do say that they are not taxable by those states in which they are only transiently present in the transaction of their commercial operations. A British ship coming to the harbor of New York from Liverpool ever so regularly, and spending half its time (when not on the ocean) in that harbor, cannot be taxed by the state of New York, (harbor, pilotage, and quarantine dues not being taxes.) So New York ships plying regularly to the port of New Orleans so that one of the line may be always lying at the latter port, cannot be taxed by the state of Louisiana. Cases above cited. No more can a train of cars belonging in Pennsylvania, and running regularly from Philadelphia to New York, or to Chicago, be taxed by the state of New York in the one case, or by Illinois in the other. If it may lawfully be taxed by these states, it may lawfully be taxed by all the intermediate states,—New Jersey, Ohio, and Indiana. And then we should have back again all the confusion and competition and state jealousies which existed before the adoption of the constitution, and for putting an end to which the constitution was adopted.

In the opinion of the court it is suggested that if all the

Cars transiently present in state not taxable.

states should adopt as equitable a rule of proportioning the taxes on the Pullman Company as that adopted by Pennsylvania a just system of taxation of the whole capital stock of the company would be the result.

Action by
other states.

Yes, if——! But Illinois may tax the company on its whole capital stock. Where would be the equity then? This, however, is a consideration that cannot be compared with the question as to the power to tax at all,—as to the relative power of the state and general governments over the regulation of internal commerce,—as to the right of the states to resume those powers which have been vested in the government of the United States.

It seems to me that the real question in the present case is as to the *situs* of the cars in question. They are used in interstate commerce, between Pennsylvania, New York, and the western states. Their legal *situs* no more depends on the states or places where they are carried in the course of their operations than would that of any steamboats employed by the Pennsylvania Railroad Company to carry passengers on the Ohio or Mississippi. If such steamboats belonged to a company located at Chicago, and were changed from time to time, as their condition as to repairs and the convenience of the owners might render necessary, it is possible that the states in which they were running and landing in the exercise of interstate commerce could subject them to taxation? No one, I think, would contend this. It seem to me that the cars in question belonging to the Pullman Car Company are in precisely the same category.

Real question
is as to *situs*.

The case of the Western Union Telegraph Co. *v.* Attorney General, 125 U. S. 530, is entirely different from the present. In that case there was no question as to the *situs* of the property taxed. It was situated within the state, consisting of poles, and wires, and offices, and a general plant for telegraphic purposes. The property belonged in Massachusetts, and was consequently taxable there. There was a phase of that case which led some of the justices of the court to doubt as to the proper decision to be made. The difficulty was this: The tax was in terms, made upon a certain proportional part of the capital stock of the company. That proportion was regulated by the number of miles of telegraph within the state as compared with the number of miles of telegraph belonging to the company in the whole country. It was objected that the property of the company situated in Massachusetts had no necessary relation to the said proportion of the capital stock, because the aggregate value of the stock might depend on property, franchises, and amount of business outside of Massachusetts, largely out

Telegraph Co.
v. Attorney
General.

of proportion to the miles of telegraph lines outside of that state. But the difficulty of getting at the true value of the property within the state, and of adopting any other rule for ascertaining it, as well as the failure of the company to show that the rule adopted produced any unfair results, finally induced an acquiescence in the decision, but expressly on the ground that though the tax was nominally on the shares of the capital stock of the company, it was in effect a tax upon the property owned and used by it in Massachusetts; the proportional length of the lines in that state to the entire length throughout the whole country being merely used as the basis for ascertaining the value of that property.

The same difficulty as to the method of determining value exists in the present case which existed in that; but the more

serious difficulty lies in the question of the *situs* of the property, and the consequent jurisdiction of the state of Pennsylvania to tax it. It is not fast property. It does not consist of real estate. It does not attach itself to the land. It is movable, and

engaged in interstate commerce, not in Pennsylvania alone, but in that and other states; and the question is, how can such property be taxed by a state to which it does not belong? It is indirectly but virtually taxing the passengers,—many of them carried from New York to Chicago, or from Chicago to New York, and most of them from one state to another. It is clearly a burden on interstate commerce. The opinion of the court is based on the idea that the cars are taxable in Pennsylvania because a certain number continuously abide there. But how can they be said to abide there when they only stop at Philadelphia and other stations to take on passengers? And it is all the same whether they cross the state entirely, or run into or out of other states with a terminus in Pennsylvania. It is only by virtue of such of its property as is situated in Pennsylvania that the Pullman Company can be taxed there. Its capital stock, as such, is certainly not taxable there. In the case of *Western Union Telegraph Co. v. Attorney General*, the tax was sustained only on the ground that it was a tax on the property in Massachusetts. The idea that the capital stock, as such, could be taxed was repudiated. The state can no more tax the capital stock of a foreign corporation than it can tax the capital of a foreign person. Pennsylvania cannot tax a citizen and resident of New York, either for the whole or any portion of his general property or capital. It can only tax such property of that citizen as may be located and have a *situs* in Pennsylvania. *State Tax on Foreign Bonds*, 15 Wall. (U. S.), 300. And it is exactly the same with a foreign corporation. Its capital, as such, is not taxa-

The tax a burden on interstate commerce.

ble. Gloucester Ferry Co. *v.* Pennsylvania, *qua supra*. To hold otherwise would lead to the most oppressive and unjust proceedings. It would lead to a course of spoliation and reprisals that would endanger the harmony of the Union.

The same dissent is made to the opinion in Palace Car Co. *v.* Hayward, *infra*.

Power of State to Tax Cars of Foreign Sleeping Car Company.—The decision of the federal supreme court in the principal case may be said to settle the law upon this subject, and will undoubtedly lead to the enactment by other states of laws similar to the Pennsylvania statute. Prior to this decision the law was in a very unsettled condition, see note 45 Am. & Eng. R. Cas. 18, 19, note 41 *Id.* 578.

In re BROOKLYN ELEVATED R. CO.

(*New York Court of Appeals, February 6, 1891.*)

Forfeiture of Charter—Non-Performance of Condition.—The non-performance by a corporation of conditions specified in its charter, in default of which it should forfeit the same, does not, *ipso facto* dissolve the corporation or deprive it of its corporate existence and corporate rights. The corporation is thereby simply exposed to proceedings in behalf of the state to enforce the forfeiture; until the state intervenes a private individual cannot set up the alleged forfeiture in condemnation proceedings instituted by such company.

Same—Elevated Railroad—Provisions of General Railroad Act.—A provision in the amendment to the General Railroad Act of New York of 1850 that if any railroad company shall not begin its road in five years and complete it within ten years after such incorporation "its corporate existence and powers shall cease" is inconsistent with the New York Act of 1874, chap. 585, chartering the Brooklyn Elevated R. Co. and prescribing the time within which the road must be commenced and completed, and providing for a forfeiture of its rights in case of a default in this regard. Accordingly, such elevated railroad is not subject to such provision in the General Railroad Act, where it was provided by its charter that the corporation should be subject to all the provisions of the General Railroad Act and the amendments thereto, except so far as they are inconsistent with the provisions of this act.

Construction of Elevated Railroad—Erection of Columns—Compliance with Statute.—The erection by the Brooklyn Elevated R. Co. of its structure in Grand Street, Brooklyn, *held* under all the circumstances to be such as the Act of 1875 authorized the company to adopt, and not unlawful, the law and the facts being liberally construed in favor of the corporation.

APPEAL from Supreme Court, General Term, Second Department.

Edward M. Shepard, for appellant.

George Hoadley, for respondent.

EARL, J.—This is a proceeding under the provisions of the

General Railroad Act to acquire real estate interests in Grand avenue in the city of Brooklyn, from Charles U. Wing, for the purposes of the Brooklyn Elevated Railway. Issue was taken upon the allegations of the petition, and the matter was brought to a hearing before a justice of the supreme court, who, after hearing the evidence, made findings of fact and of law, holding that the petitioner had made a case for the appointment of commissioners to ascertain and appraise the compensation to be paid to Wing for his real estate interests taken, and an order was made and entered appointing such commissioners. From that order Wing appealed to the general term, and then to this court. The Brooklyn Elevated Railway Company derives its corporate life from the following acts of the legislature: Chapter 585 of the Laws of 1874; chapter 422 of the Laws of 1875; chapter 350 of the Laws of 1879; chapter 459 of the Laws of 1880; chapter 338 of the Laws of 1881; and chapter 539 of the Laws of 1885,—and its road was built through Grand avenue, and in operation there at the time when this proceeding was instituted. The acts required that the road should be commenced and completed within times specified, and, in default thereof, that it should “forfeit the rights acquired by” it under the acts. We will assume that it did not commence or complete its road within the time specified, and yet we reach the conclusion that the claim of Wing that it had lost its corporate existence and its “rights acquired” under the acts is unfounded. What is meant by “rights acquired” under the acts? We answer. All its rights, including its right to be a corporation. It could not, within the meaning of the act, forfeit all its rights and still be a corporation. A corporation without rights, without legal capacity to do anything, not even to acquire rights, is inconceivable. What was plainly meant is that the corporation should, in the event mentioned, forfeit its charter, and that included all the rights acquired by it under the acts from which it derived corporate existence; and thus the legislative meaning is the same as if the language used had been “forfeit its charter,” or its “chartered rights.” For the non-performance of conditions specified such language has never been held *ex proprio vigore* to put an end to corporate life. By such non-performance a corporation is not *ipso facto* dissolved or deprived of its corporate existence or corporate rights, but it is simply exposed to proceedings on behalf of the state to establish and enforce the forfeiture. The state, which gave the corporate life, may take it away. The state, which imposed the conditions, may waive their performance, and the corporate life may run on until the state,

**Forfeiture of
charter by
failure to
complete
roads.**

by proper proceeding, intervenes, and enforces the forfeiture. Until the state does thus intervene, a private individual cannot set up the forfeiture, or in any way challenge the corporate existence with its full vitality. The authorities for these views are numerous and uniform, both in this country and England. *State v. Fagan*, 22 La. Ann. 545; *Niagara Bank v. Johnson*, 8 Wend. (N. Y.), 645; *People v. Manhattan Co.*, 9 Wend. (N. Y.), 351; *in re New York El. R. Co.*, 70 N. Y. 327; *in re Kings Co. El. R. Co.*, 105 N. Y. 97; *Day v. Ogdensburg & L. C. R. Co.*, 107 N. Y. 129, 35 Am. & Eng. R. Cas. 102; *Moore v. Brooklyn City R. Co.*, 108 N. Y. 98; *Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 49; *Van Wyck v. Knevals*, 106 U. S. 360, 10 Am. & Eng. R. Cas. 664. Our attention has been called to many cases arising under the revenue laws of our country, which provide for forfeiture of goods on account of offenses against such laws, wherein, as claimed, it was held that the forfeiture of title in such cases takes effect from the commission of the offense without legal proceedings. Those cases, and others involving violations of the police laws, may stand upon a peculiar policy, and, in any event, they are not authority in the case now here. The learned counsel for the appellant, with all his industry, has not been able to find a single case involving the forfeiture of corporate rights and franchises wherein such language as we have here has been held sufficient to work out a self-executing forfeiture without the intervention of the courts or the legislative power. The general rule established by the authorities above cited was fully recognized *in re Brooklyn, W. & N. R. Co.*, 72 N. Y. 545, 75 N. Y. 335, and in *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524. For the non-performance of conditions specified in the former case it was provided that "the corporate existence and powers shall cease," and in the latter case that "this act, and all the powers, rights, and franchises herein and hereby granted, shall be deemed forfeited and terminated." We held that this clear and emphatic language indicated a legislative intent that the corporate life should, for the defaults mentioned, come to an end, and not merely be exposed to forfeiture by proceedings on behalf of the state. These decisions, we think, stand well upon reason. But they are border cases, and the doctrine laid down in them should not be applied to cases where the legislative intent of a self-executing forfeiture is not equally plain. An undue extension of the doctrine would imperil the vested rights of individuals, and in many cases might prejudice the interests of the public. We have found but one similar decision,—that made in *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, where the language to be construed was, "shall ut-

terly cease and be forfeited." Similar language was held not to provide for *ipso facto* forfeiture in *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. Md. 1; *Briggs v. Cape Cod S. Canal Co.*, 137 Mass. 71, and *Wallamet Falls Co. v. Kittridge*, 5 Sawy. U. S. 44.

It was provided in § 10 of the act of 1874, in which the life of the Brooklyn Elevated Railway Company originated, that the corporation thereby created should possess all the rights, powers, and privileges, and be subject to all the provisions, of the general railroad act of 1850 and the several acts amendatory thereof, "except as far as the provisions of said acts and amendments are modified by or are inconsistent with the provisions of this act." Among such amendatory acts is the act chap. 775 of the Laws of 1867, in which it is provided that, "if any such corporation formed under the general act shall not within five years after its articles of association are filed and recorded begin the construction of its road, and expend thereon ten per cent. of the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association as aforesaid, *its corporate existence and powers shall cease.*" In *Re Brooklyn, Winfield & Newton Railroad Company* we held that the language of this act which we have italicized provides for a self executing forfeiture, and if, therefore, as claimed by the learned counsel for Wing, the provision quoted is made applicable to this corporation, his contention that it has lost its corporate existence and its right to institute this proceeding is well founded. But the provision of the general railroad act is inconsistent with that contained in the act of 1874, and, as to this corporation, is modified by that act, which provides a particular time for the commencement and completion of the road authorized thereby, and the consequence of a failure to perform the conditions. The whole subject is provided for by that act and the other acts relating to this corporation, and hence there is no room for the operation of the provision of the act of 1867, above quoted, and it can have no application to this road. We have therefore reached the conclusion that this corporation has not lost its corporate existence, or its right to institute this proceeding. We have assumed, as sufficient for the present purpose, that the corporation did not commence or complete its road within the times required, and have not therefore deemed it important to consider the able argument submitted on behalf of the corporation to show that it did comply with the conditions specified, and also to show ratification of its corporate rights by the recognition on the part of the legislature of its full corporate existence.

This railroad was constructed in Grand avenue, upon two rows of iron columns, placed upon foundations which are eight feet and four inches apart and eight feet and eight inches from the curb on each side, and which thus divide the avenue into three spaces substantially equal. It is for a road thus constructed that

Lawfulness of
construction
of road.

the corporation in this proceeding seeks to condemn the real estate interests of Wing. He claims that the road is illegally and improperly constructed, and that the corporation cannot take his interests in the avenue for such a structure. Section 5 of the act of 1874 provides that "the said elevated railway shall be constructed as follows, namely, iron columns shall be placed on each side of the street, avenue, or roadway in a line with the curbstones; said columns to be firmly bolted to concrete foundations of suitable size and shape to insure perfect firmness in all cases; said foundations and the location of them to be subject to the approval of the chief engineer of the board of city works of the city of Brooklyn. * * *

Iron girders not more than thirty-six feet in length shall be placed across the streets and avenues, and be properly attached to the tops of such columns." What kind of a structure did this authorize? It did not require that the columns should be placed in or on the curbs, because the girders could not be more than 36 feet long, and some of the streets were wider than that between the curbs. They were required to be placed on the sides of the streets, not necessarily in the curbs, but on a line with them, and thus necessarily parallel with them; and that they might be placed so as to do the least injury, and cause the least inconvenience and obstruction, their location was subject to the approval of the engineer. This section was amended by chap. 422 of the Laws of 1875 so as to read as follows: "The said elevated railway shall be constructed as follows: Iron columns shall be placed on each side of the streets, avenue, and roadways, as near as practicable on a line parallel with the curbstones, said columns to be firmly bolted to concrete foundations of suitable size and shape to secure perfect firmness in all cases, subject to the approval of the chief engineer. * * * Iron girders shall be placed above the streets and avenues, and be properly attached to the tops of such columns." This amended section did not restrict the powers of this corporation, for thereafter it could build precisely such a structure as it was before authorized to build, but its powers were enlarged. Instead of using transverse girders, it could, at its option, use longitudinal girders. Where were the columns to be placed? The claim of the learned counsel for Wing is that they were still required to be placed on the sides of the street, but as

near as practicable on a line parallel with the curbs. We have no light for the construction of the amended section except that furnished by the language thereof, as well as by the language of the section prior to its amendment. We think the comma after the word "roadways" should be placed after the word "practicable," and thus the requirement is that the columns should be placed as near as practicable on the sides of the streets, but parallel with the curbs. If the amendment was simply for the purpose of requiring the columns to be placed as near as practicable parallel with the curbs, it was unnecessary, as the unamended section required that. Before, the columns were required absolutely to be placed on the sides of the streets; and we think the plain purpose of the amendment was to alter this rigid requirement, and to authorize the columns to be placed as near as practicable to the sides of the streets. The person who drafted the amended section evidently intended to provide for a case where the rows of columns might be placed near to each other, and at some distance from the curbs, as the section was so amended as to allow longitudinal girders. We may suppose, in the absence of any proof on the subject, that if the columns were placed near the curbs, transverse girders spanning the streets would be needed to uphold the structure; but if the columns were placed near to each other, transverse girders would not be needed, or even as appropriate as longitudinal girders. Under the amended section, as before, the location of the columns and the foundations thereof were to be subject to the approval of the engineer, and in this the public as well as the abutting owners were expected to have all reasonable and practical protection. In thus construing this section, we are obliged to transpose a comma, but in so doing we violate no canon of construction, as we think the legislative sense requires it, and such liberty with punctuation is frequently taken by the courts. In *Gyger's Estate*, 65 Pa. St. 311, SHARSWOOD, J., said: "There is no punctuation in a statute which ought to rule;" and in *Cushing v. Worrick*, 9 Gray, 382, the court said: "The general rule is that punctuation is no part of a statute." See, also, *Hamilton v. The Hamilton*, 16 Ohio St. 428. There was evidence tending to show that these columns were placed, as nearly as practicable, on the sides of the streets, and we see no occasion to interfere with the finding of the court below upon such evidence. The corporation, subject to the approval of the engineer, was clothed with some discretion as to the location of the columns; and with the reasonable exercise of that discretion no court should interfere. *Southern Minn. R. Co. v. Stoddard*, 6 Minn. 150 (Gil. 92); *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen

(Mass.), 221; Boston & P. R. Corp. v. Midland R. Co., 1 Gray (Mass.), 341; Parke's Appeal, 64 Pa. St. 137. It does not appear that the public authorities object to the location of those columns, or that Wing made any objection until after they were located and the road was in operation. The only interests he appears to have in the street which are peculiar to him, and for which he can have any protection or compensation, are his easements of light, air, and access; and it is very clear that these easements are less interfered with than they would be if the columns on his side of the street had been placed nearer to the curb. Under all the circumstances, therefore, we think it is but fair and just that both the law and the facts should, as to the location of the columns, be liberally construed in favor of the corporation, and we must hold that their location is not unlawful. Other points are argued in the briefs submitted on behalf of Wing. They are of a technical nature, not relating to the merits of the controversy between these parties, and we leave them upon the findings of the court below, believing that they do not point out any error, and that they require no further notice. The order should be affirmed, with costs. All concur.

Forfeiture of Charter by Failure to Construct Road.—See Bywaters v. Paris, etc., R. Co. (Tex.), 38 Am. & Eng. R. Cas. 498, note 501.

STATE *ex rel* CLAPP, Attorney General,

v.

SIOUX CITY & NORTHERN R. CO.

(43 Minnesota 17.)

Foreign Railroad Company—Filing Articles of Incorporation—Payment of Fees.—Gen. Laws Minn. 1877, chap. 14, authorizes railroad companies organized under the laws of Iowa to extend their lines into Minnesota, and gives them the powers and privileges, and subjects them to the same liabilities of railroad companies organized under the laws of Minnesota; provided such non-resident companies shall first file a copy of their articles of incorporation with the secretary of state. Gen. Laws Minn. 1889, chap. 225, provides that no corporation shall be created or organized under the laws of Minnesota, unless the incorporators shall, at or before the filing of the articles of incorporation pay into the state treasury a certain per cent. of the capital stock of such corporation. *Held*, that the latter act applies to Iowa railroad companies who accept the provisions of the law of 1877, and such companies are required, as a condition precedent to filing their articles, to pay the fees prescribed by the act of 1889.

QUO WARRANTO.

Moses E. Clapp, Atty. Gen., for relator.

Daniel Rohrer, for respondent.

46 A. & E. R. Cas.—17

MITCHELL, J.—Chapter 14, Gen. Laws 1877, provided that “any railroad organized, or that may be hereafter organized, under the laws of the state of Iowa, is hereby authorized to extend and build its road into the state of Minnesota; and such railroad company shall have and possess all the powers, franchises, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the general laws of this state: provided such non-resident company shall first file a true copy of its articles of incorporation with the secretary of this state, and shall comply with the laws of Minnesota as to filing and recording its articles of incorporation.” On March 28, 1889, another act was passed which provided, generally, that any railroad company organized under the laws of other states is authorized, upon being incorporated in this state as hereinafter provided, to build and extend its road into this state, and shall have and possess all the powers and franchises, and be subject to the same liabilities as railroad corporations organized and incorporated under the general laws of this state: provided such railway company shall first file in the office of the secretary of this state a copy of its articles of organization or incorporation, and shall comply with the law of this state as to filing and recording its articles of incorporation; that upon and after the filing of its said articles, which shall be deemed an acceptance of the benefits of the act, the said corporation “is hereby declared to be a legal domestic corporation.” A third act was passed April 24, 1889, (chap. 225, Gen. Laws 1889,) which took effect May 1st of the same year, providing “that no corporation or association * * shall hereafter be created or organized under the laws of this state, unless the persons named as corporators therein shall, at or before the filing of the articles of association or incorporation, pay into the state treasury the sum of fifty dollars for the first \$50,000, or fraction thereof, of the capital stock of such corporation or association, and the further sum of five dollars for every additional \$10,000, or fraction thereof, of its capital stock.”

The respondent was organized as a corporation under the laws of Iowa, October 3, 1887, with a capital stock of \$10,000,000 for the purpose of constructing and operating a railroad from Sioux City, in that state, to the south boundary of Minnesota, and thence through this state to Duluth. In the summer of 1889, it constructed, and is now operating in this state, a portion of its line of road, and assumes to possess, and is exercising in this state, all the powers and franchises of domestic railway corporations claiming the right to do so under the act of 1877. Its articles of associa-

Statutory provisions.

Facts.

tion have never been filed with the secretary of this state, but subsequently to May 1, 1889, it tendered to him a copy of the same, and requested him to receive and file them: but he declined to do so unless the company would first pay to the state treasurer \$5,025, the percentage on its capital stock required by chapter 225, Laws 1889. This the company declined to do, claiming that the provisions of this act did not apply to it, as not being a corporation "created and organized under the laws of this state," but one created and organized under the laws of Iowa; and the correctness of this contention is the only question raised by the demurrer to the information. The state contends that the act of March 28, 1889, is the law applicable to the case; its position, as we infer, being that as this act is general in its terms, and covers the whole subject, it repeals by implication the act of 1877. If this were so, it would be decisive of the case adversely to the respondent company, for it is very clear that the act of March, 1889 provides for, not a mere statutory license to a foreign railroad corporation to transact business in this state, but a reincorporation, and placing it upon the footing of a domestic corporation within the state. Hence any company accepting its provisions, although also a corporation of another state, would be here a corporation "created and organized under the laws of this state." But we shall assume, without deciding, that the act of 1877 is still in force, and also assume, without deciding, that an Iowa railway company, by accepting the benefits of that act, does not become, strictly speaking, a domestic corporation, but merely obtains a statutory license to construct and operate railways in this state, under a grant of all the powers and franchises possessed by domestic railway companies under the laws of this state. This, of course, is the position most favorable to the contention of the respondent. But, even with these concessions, we think that the case comes clearly within the spirit, and also within the language, of chapter 225, Laws 1889, giving to the expression, "created and organized under the laws of this state," a liberal, but allowable, construction, in accordance with the sense in which it is apparently used in this connection.

The franchises and privileges which a corporation may exercise within the jurisdiction of any state must in all cases be derived from the laws of that particular state; and this is equally true whether the corporation be admitted to act in the state by a statutory license, or by a grant of a complete charter. Hence the corporate existence of the respondent, considered with reference to its rights and powers in Minnesota, springs wholly from the legislation of this state, which by its own

Contentions
of parties

Foreign com-
pany must
pay fees.

vigor performs the act. Therefore, while considered as a legal entity, with the mere right to exist, the respondent may derive its birth and life from the laws of Iowa, yet all its powers, franchises, and privileges, which are the essential and only valuable rights of the corporation, in Minnesota are as entirely and exclusively the creation of the laws of this state as if it was a domestic corporation primarily brought into being by these laws. In this sense the respondent here is created under the laws of Minnesota, and comes fairly within the language, as it clearly does within the spirit, of chapter 225. It has frequently been held that it is a reasonable construction of statutes purporting to regulate all corporations created or organized under the laws of a state to hold that such statute applies to foreign corporations reincorporated by the state, or permitted by statutory license to exercise their franchises within its territory. *Mor. Priv. Corp.* § 998. This statute ought, if possible, as we think it reasonably may, be given this construction; for it is not to be supposed that the legislature intended to exempt corporations primarily created by the laws of another state from the payment of fees exacted from corporations exclusively domestic, when the former obtain and enjoy to the fullest extent all the powers, franchises, and privileges under our laws which are possessed by the latter. No reason for any such discrimination exists, and we ought not to presume that it was intended to make any such distinction, unless conclusively forced to such a result by the language of the act. The act of 1877, and chapter 225 of the Laws of 1889, are to be construed together; and, as the latter requires the payment of these fees as a condition precedent to the filing of the articles of association, and as the former requires an Iowa corporation to comply with the laws of Minnesota as to filing its articles of incorporation, our conclusion is that it was incumbent on respondent to pay these fees before it could file its articles, and that until the articles are duly filed it has no right to exercise corporate franchises in this state. The demurrer to the information is overruled, and judgment ordered for the state, unless the respondent answer within 30 days.

Foreign Railroad Company—Filing Copy of Charter.—Acts 18th Gen. Assem. Iowa, chap. 128, provide that any railroad company organized under the laws of another state, owning and operating a line of road within this state, "shall have and possess all the powers, franchises, rights, and privileges, and be subject to the same liabilities of railroad companies organized and incorporated under the laws of this state, including the right to sue, and the liability to be sued, the same as railroads organized under the laws of this state." *Held*, that a foreign railroad corporation cannot claim the rights of a domestic corporation without showing that it has filed a copy of its charter as provided by this act. *State v. Chicago, M. & St. P. R. Co.*, 80 Iowa, 586.

HUMPHREYS *et al.* v. McKISSOCK, Receiver.

WABASH, ST. LOUIS & PACIFIC R. CO. v. McKISSOCK,
Receiver.

(140 United States, 304.)

Mortgage—Stock owned by Railroad Company in Elevator Company—Power of Railroad to Mortgage Interest in Elevator.—A railroad company which owns stock in a corporation promoted by several railroad companies to construct an elevator to be connected with their respective roads, has no specific interest in the elevator constructed by such corporation which it can mortgage. The interest of the railroad company in the elevator is that of a mere stockholder of the company which constructed it. Ownership of stock in a corporation should not be confounded with ownership of its property.

Same—Mortgage of Railroad and "Appurtenances"—Interest in Elevator.—Where a railroad company mortgages its road and the "appurtenances" thereunto belonging, such mortgage does not pass an interest of the railroad company as a stockholder of a corporation owning an elevator constructed on land not belonging to the railroad company, and situated at some distance from its road; nor does the stock of the elevator company pass to the mortgagee under such mortgage.

APPEALS from the Circuit Court of the United States for the Southern District of Iowa.

The two appeals in these cases are from the same decree. Both will be disposed of by the same decision, which will turn upon the effect of a mortgage executed by a railroad corporation of railroad property upon a subsequently acquired interest of the mortgagor in the stock of an elevator company. The material facts out of which the controversy arises are very fully and clearly set forth in the briefs of counsel. They are substantially as follows: On the 15th of February, 1879, the St. Louis, Kansas City & Northern Railway Company, a corporation created under the laws of Missouri, owned a railroad extending in a northeasterly direction from Elm Flats, in Davies county of that state, through the counties of Davies, Gentry, Nodaway, and Atchison, to the boundary line between Missouri and Iowa. It was also the lessee for a term of years of a railroad extending from Council Bluffs, in Iowa, in a southeasterly direction, through the counties of Pottawatomie, Mills, Fremont, and Page, to a point on the boundary line, where the railroads connected. On that day, for the purpose of securing the payment of 250 bonds, each for the sum of \$1,000, the railway company mortgaged its leasehold estate in the railroad in Iowa, and its title in fee to its railroad in Missouri, to the United States

Trust Company of New York, as trustee. The property described in the mortgage is as follows: "All and every part and parcel of the continuous line of railroad, and all right, title, and interest therein, as now owned, leased, and held by said St. Louis, Kansas City & Northern Railway Company, commencing at Elm Flats, near Pattonsburg, in the state of Missouri, and extending through the counties of Davies, Gentry, Nodaway, and Atchison, in the state of Missouri, and through the counties of Page, Fremont, Mills, and Pottawatomie in the state of Iowa, to the city of Council Bluffs in said state, as said railroad now is or may be hereafter constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water-tanks, engines, cars, and other appurtenances thereunto belonging." On the 10th of November, 1879, the St. Louis, Kansas City & Northern Railway Company was consolidated with the Wabash Railway Company of Illinois, Indiana, and Ohio, and the corporation thus formed took the name of the Wabash, St. Louis & Pacific Railway Company. Afterwards, on the 17th of December, 1880, a corporation was formed under the laws of Iowa by certain parties named Dillon, Hopkins, Keep, Riddle, and Perkins, known as the "Union Elevator Company." Its articles of incorporation provided that its principal place of business should be at Council Bluffs, that its stock should be \$500,000, and that the subscriptions to the stock should be paid in when called for by the board of directors. The parties who formed this corporation were officers of different railway companies doing business at Council Bluffs. Immediately after its organization, the elevator company, as party of the first part, entered into a written contract with the Union Pacific Railroad Company as party of the second part; the Wabash, St. Louis & Pacific Railway Company as party of the third part; the Chicago, Rock Island & Pacific Railway Company as party of the fourth part; the Chicago, Burlington & Quincy Railway Company as party of the fifth part; the Chicago & Northwestern Railway Company as party of the sixth part; and the Chicago, Milwaukee & St. Paul Railway Company as party of the seventh part; in which each of the companies agreed to subscribe \$100,000 to the capital stock of the elevator company, and to contribute equally thereto; and the elevator company agreed that in conducting its business it would not discriminate in favor of or against either of the companies, but would at all times serve them on equal terms. In 1881 these companies subscribed for an equal amount of stock in the elevator company, and in 1881 and 1882 the elevator was erected at a cost of

\$280,000. When completed it was leased by the elevator company to certain parties, who afterwards operated it as tenants of that company. The different companies subscribed equal amounts for the construction of the elevator, which subscription was in reality only one-sixth of \$280,000, and not one one-sixth of \$500,000, the authorized amount of its capital stock. Each, therefore, paid \$46,666.66, and received its stock, except the Wabash, St. Louis & Pacific Railway Company, which paid only \$41,666.66, leaving \$5,000 due. For want of this last payment no stock has been issued to that company. It will be entitled to receive its proportional part of the stock upon the payment of that sum. In 1884 the Wabash, St. Louis & Pacific Railway Company became insolvent, and on the 29th day of May of that year Solon Humphreys and Thomas E. Tutt were, in proceedings before the circuit court of the United States for the eastern district of Missouri, appointed receivers of all its property, including the railroad from Elm Flats, Mo., to Council Bluffs, Iowa. In June, 1885, a bill was filed in the circuit court of the United States for the southern district of Iowa, western division, by the United States Trust Company of New York, against the Wabash, St. Louis & Pacific Railway Company, to foreclose the mortgage of February 15, 1879, executed by the St. Louis, Kansas City & Northern Railway Company (afterwards merged into the Wabash, St. Louis & Pacific Railway Company), covering the road from Elm Flats to Council Bluffs. On March 3, 1886, that court appointed Thomas McKissock receiver of the premises and property described in the mortgage, with power and instructions to take possession thereof. Previously to this, on January 6, 1886, the circuit court of the United States for the eastern district of Missouri had made an order directing the receivers, Humphreys and Tutt, to transfer and surrender to the trustee of the mortgage, the United States Trust Company, or to any person or receiver appointed at its instance by the circuit courts of the states of Iowa or Missouri, in which the foreclosure suits brought by the trustee might at the time be pending, the entire line of railroad known as the "Omaha Division of the Wabash, St. Louis & Pacific Railway Company," by which was meant the line extending from Elm Flats to Council Bluffs; and also all property, real and personal, pertaining to that division, then in their possession and control.

Under the facts as thus stated the situation of the case was this: Humphreys and Tutt, as receivers of all the property of the Wabash, St. Louis & Pacific Railway Company, appointed by the circuit court of the United States for the eastern district of Missouri, claimed possession and the right

to hold the interest of that company in the stock of the elevator company. On the other hand, McKissock, as receiver of the property described in the mortgage to the trust company, claimed the stock in the elevator company as covered by that mortgage, and demanded its transfer to him by Humphreys and Tutt. This being refused, he filed the present petition to enforce the demand. The court directed its reference to a special commissioner to take proofs and report the same with his findings of law and fact. He found the facts substantially as stated, and also that the elevator was immediately connected with the main line of the Wabash, St. Louis & Pacific Railway Company; that that company shipped large quantities of grain out of Council Bluffs over the Omaha division; that the elevator was erected for the sole purpose of storing and handling grain to be transported over the six railroads; that the erection of an elevator by the Wabash, St. Louis & Pacific Railway Company at Council Bluffs was necessary to the conduct of its business as a shipper of grain; and that the handling and shipping of grain could not be successfully carried on at Council Bluffs without one. As a conclusion of law he held that the elevator was a common appurtenance to the railways, and that the one-sixth interest therein of the Wabash, St. Louis & Pacific Railway Company was an appurtenance belonging to its line of railway, and was covered by the mortgage of February 15, 1879, and formed a part of the mortgage security. He therefore recommended the entry of an order directing that company and its receivers to execute and deliver to McKissock a proper assignment of the interest of that company and of the receivers in the elevator. Exceptions were taken to this report, but they were overruled by the court; the report was confirmed, and a decree entered that Humphreys and Tutt execute and deliver to McKissock, as receiver, a proper assignment of all the interest of the Wabash, St. Louis & Pacific Railway Company, or of themselves as receivers, in the Union elevator. From that decree appeals were taken to this court. Notwithstanding the decree speaks of the interest of the Wabash, St. Louis & Pacific Railway Company in the Union elevator, it was stipulated that the company had no interest otherwise than as a stockholder in the property of the Union Elevator Company. The evidence before the commissioner also showed that the elevator was not immediately on the main line of the Wabash Company, as found by him, but was distant more than half a mile from it, and was only reached by passing over the tracks of another company.

Wells H. Blodgett and F. W. Lehmann, for appellants.

Edward W. Sheldon and Theo. Sheldon, for appellees.

FIELD, J.—The commissioner in his report committed a manifest error in holding that the Wabash Company possessed any interest in the property of the elevator company. The facts found by him as to the organization of the latter, the subscription to its stock, the construction of the elevator, and its lease to others, show beyond controversy the independent existence of that corporation, and that the railway company had no specific interest in its elevator or other property which it could mortgage. It was a mere stockholder in the elevator company. If there had been any doubt on this point from the evidence before that officer, on which he found the facts stated, it must have been removed by the stipulation of the parties. The court below therefore erred in confirming the commissioner's report in that particular, and entering a decree that Humphreys and Tutt, as receivers of the Wabash Company, execute and deliver to the petitioner, McKissock, an assignment of an interest supposed to be held by it, or by them as such receivers in the Union elevator. That railway company had no interest which it could assign. The building belonged to the Union Elevator Company: and the railway company was entitled, by its subscription, when paid, only to a certain proportion of its stock. Both the commissioner and the court in confirming his report and entering the decree mentioned seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights; the ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incur nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law. In *Smith v. Hurd*, 12 Metc. (Mass.), 385, the relations of stockholders to the rights and property of a banking corporation are stated with his usual clearness and precision by Chief Justice SHAW, speaking for the supreme court of Massachusetts, and the same doctrine applies to the relations of stockholders in all business corporations. Said the chief justice: "The individual members of a corporation, whether they should all join or each act severally, have no right or power to intermeddle with the property or concerns of the bank, or call any officer, agent, or servant to account, or discharge them from any liability. Should all the stockholders join in a power of attorney to any one, he could not take possession of any real or personal estate, any secu-

Interest of
railroad in
elevator.

rity or chose in action; could not collect a debt, or discharge a claim, or release damage arising from any default; simply because they are not the legal owners of the property, and damage done to such property is not an injury to them. Their rights and their powers are limited and well defined.

The commissioner also committed a manifest error in his report in holding that the elevator was a common appurtenance to the railroads of the several companies

**Elevator not
an appurte-
nance to rail-
road.**

having the stock of the elevator company, and that one-sixth interest therein was an appurtenance to the railroad of the Wabash Company. It is difficult to understand the course of reasoning by which a certificate of stock in an independent corporation can be an appurtenance to a railroad. If stock in the company in question could be considered an appurtenance to a railroad, by the same rule stock in a bank, or in any other corporation, with which the railroad did business, might be so considered. But were we to consider the Wabash Company as possessing a separable legal interest in the elevator, it would not be appurtenant to its railroad. That building is situated at some distance from the railroad,—more than half a mile,—and is erected on land not belonging to that company, but leased from the Union Pacific Railway Company, and can only be reached by crossing the tracks of another company. Had the elevator been constructed upon property covered by the mortgage it might have been contended that it fell, to the extent of the one-sixth interest, under the mortgage, as one of the depots of the company. The term “depot” in the mortgage is not necessarily limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains. It applies also to buildings used for the receipt and storage of freight, which, when received, is to be safely kept until forwarded by the cars of the company, or delivered to the owner or consignee. Such a building, whether existing at the time of the mortgage or constructed afterwards upon the property of the company covered by it, may pass under the mortgage as one of its depots, but will not pass as an appurtenance to the property previously existing. A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. *Harris v. Elliott*, 10 Pet. (U. S.), 25, 54; *Jackson v. Hathaway*, 15 Johns (N. Y.), 447, 455; *Linthicum v. Ray*, 9 Wall. (U. S.), 241. Of two parcels of land one can never be appurtenant to the other, for, though the possession of the one may add greatly to the benefit derived from the other, it is not an incident of the other, or essential to the possession

of its title or use; one can be enjoyed independently of the other. As said by the court of appeals of New York in *Woodhull v. Rosenthal*, 61 N. Y. 390: "A thing 'appurtenant' is defined to be a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant. It results from this definition that land can never be appurtenant to other land, or pass with it as belonging to it. All that can be reasonably claimed is that the word 'appurtenance' will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created. Even an easement will not pass unless it is necessary to the enjoyment of the thing granted." Under the term "appurtenances," as used in the mortgage in question, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company, and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of a railway and what would be only convenient. *Bank of Commerce v. Tennessee*, 104 U. S. 493, 496. The elevator in question was at all times under an independent management, and was used in the same manner as any other warehouse not on the premises of the railway company to which it sent cars for freight. The court therefore erred in confirming the report of the commissioner in the particular mentioned, and in passing its decree upon the assumption that the Wabash Company had a legal separate interest in the elevator, and that the mortgage attached to such interest. That company, as already stated, possessed only stock in the elevator company; and the ownership of stock in one company has never been adjudged to be an appurtenance to a line of railroad belonging to another company.

There is no merit in the position that the question involved in these appeals was adjudicated by the decree foreclosing a subsequent mortgage of the Wabash Company. It appears that on June 1, 1880, a general mortgage was executed by that company to the Central Trust Company of New York upon different lines of railroad, including the Omaha division. When this was foreclosed the decree declared that the mortgage was a lien on the interest of the Wabash Company in the elevator at Council Bluffs, the court erroneously assuming that the company was possessed of an interest therein. That supposed interest was ordered to be sold, together with other property covered by the mortgage, without affecting the lien of numerous other contracts, leases, and senior divisional

Adjudication
of rights by
decree of fore-
closure.

mortgages. The object of the suit was to have a sale of the property covered by that mortgage, without in any manner affecting the rights of other mortgage creditors. The decree itself declared that neither it nor any sale under it should in any way prejudice or affect the rights of parties or persons interested in certain mortgages, deeds of trust, leases, and contracts, which were set forth, among which was the mortgage of February 15, 1879, and that all the rights of such persons and parties were thereby reserved to them. It is plain, therefore, that the rights of parties to this proceeding were not determined by that decree. From the views expressed we are of opinion that the stock held by the Wabash Company in the Union Elevator Company at Council Bluffs was not covered by the mortgage executed on February 15, 1879, such stock not being in any sense an appurtenance to the property covered by the mortgage. The decree on the petition of intervention must therefore be reversed, and the case remanded to the circuit court, with a direction to dismiss the petition. It is so ordered.

What Passes Under Conveyance as "Appurtenance."—One entire railroad will not pass as an "appurtenance" to another railroad under a deed of conveyance. *Philadelphia v. Phila. & R. R. Co.*, 58 Pa. St. 253. For a complete collection of cases showing what is included under the term "appurtenance" see 1 Am. & Eng. Ency. Law. 641.

CENTRAL TRUST CO.

v.

KNEELAND.

(138 *United States*, 414.).

Mortgage—Property Covered—Terminal Facilities.—A railroad company incorporated to construct a railroad between two cities named as its termini, gave a mortgage upon its line of road constructed, or to be constructed between the named termini, together with all the stations, depot-grounds, engine-houses, machine shops, buildings, and erections appertaining to said railroad or which might thereafter appertain thereto. *Held*, that the mortgage created a lien upon the terminal facilities of the railroad in the cities named as its termini, and was not limited to so much of the road as was found between the city limits of those places.

Mortgage Covering After-Acquired Property—Construction.—Where a mortgage given by a railroad company contains the "after acquired property" clause, such mortgage is made thereby to cover not only property then owned by the company and described in it, but also property coming within the words of the description, and subsequently acquired whether by legal title or by a full equitable title; and there are no equities to set aside this rule.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

On the 17th of January, 1880, the Toledo, Delphos & Burlington Railroad Company, a corporation organized by the consolidation of several constituent companies, executed a mortgage to the Central Trust Company of New York, by which it conveyed the following property: "All and singular the line of railroad of the said party of the first part, as the same now is or may hereafter be constructed, between Toledo, Lucas county, Ohio, through the counties of Lucas, Wood, Henry, Putnam, Allen, and Van Wert, in the state of Ohio, and the counties of Adams, Wells, Huntington, Wabash, Miami, Grant, and Howard, in the state of Indiana, (and not including the branch line from Delphos, Allen county, Ohio: thence via Spencerville, Mendon, and Mercer, and through the counties of Allen, Van Wert, and Mercer, to Shanesville, Mercer county, Ohio), being about one hundred and eighty miles in length, together with all and singular the rights of way, roadbed made or to be made, its track laid or to be laid, between the terminal points aforesaid, together with all the stations, depot grounds, rails, fences, bridges, sidings, engine houses, machine shops, buildings, erections, in any way now or hereafter appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools, and fixtures now and at any time hereafter held, owned, or acquired by the said party of the first part, for use in connection with its line of railroad aforesaid, and all its depot ground, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities now or hereafter owned by the said party of the first part, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be levied and derived therefrom;" and also provided: "The said party of the first part expressly covenants and agrees that it will, on demand, from time to time hereafter execute, acknowledge, and deliver unto said party of the second part any and all such further and other conveyances and assignments as may be necessary and proper to fully convey to and vest in the party of the second part, or the trustee for the time being, all such future acquired depots, grounds, estates, equipments, and property as it may hereafter from time to time purchase for use in and upon its said line of railroad, and intended to be hereby conveyed." On June 21, 1880, the same railroad company executed to the same trustee another mortgage, known as the "Terminal Trust Mortgage." The property thereby conveyed is thus described: "All and singular the line of railroad of the said party of the first part as the same now is or may hereafter be constructed, between the southeasterly end of Washington street, in the city of Toledo, Lucas

county, Ohio; thence northwesterly along Washington street to the aforesaid canal lands in said city; thence southwesterly along said abandoned canal lands to Swan Creek, in said city; thence over said Swan Creek and the Miami and Erie canal, and over and along Mill street and Canal avenue, in said city, to the westerly limit thereof; and thence to the point where said railroad crosses the westerly limit of said city of Toledo; together with all and singular the franchises, rights of way, station grounds, shop grounds, side-track grounds, and grounds of any and every kind, for whatever purpose bought, between the points aforesaid, viz., the southeasterly end of Washington street in the city of Toledo, state of Ohio, and the westerly limits of said city, and together with the roadbed made or to be made, and tracks and side-tracks laid and to be laid thereon, together with all stations, workhouses, engine houses, shops, turntables, water-tanks, buildings, erections of every description, and all facilities of any and every description appertaining to said roadbed, station grounds, shop grounds, and lands of every kind and for every purpose lying between the points aforesaid owned or acquired by the said party of the first part, for the use in connection with the part of its line of railroad aforesaid, and all its said depot grounds, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities now and hereinafter owned by the said party of the first part in connection with the said part of its railroad, together with all and singular the powers and franchises thereto belonging, and the tolls, income, and revenue to be levied or derived therefrom." On foreclosure proceedings, duly had, of the first mortgage, appellee became, in the interest of the bondholders, the purchaser. After confirmation of sale and passage of title, and during the pendency of a suit to foreclose the second mortgage referred to, this proceeding was commenced by the trustee in the latter mortgage, and certain holders of bonds secured thereby, against Kneeland, the purchaser. The bill was practically one to quiet the title of those security holders to the terminals in Toledo. To this bill Kneeland filed an answer and cross-bill. In the latter he set up his title under the first mortgage and the sale, and prayed to have his title quieted to these terminals. Upon proofs and hearing, the circuit court rendered a decree in favor of Kneeland, quieting his title to all except a small strip of the right of way, thereby adjudging priority of lien to the first mortgage. This decree the appellants have brought to this court for review.

W. W. MacFarland, for appellants.

John M. Butler, *R. G. Ingersoll*, and *Clarence Brown*, for appellee.

BREWER, J.—The first mortgage had the “after-acquired property” clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage. *Pennock v. Coe*, 23 How. (U. S.), 117; *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.), 254; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.), 459; *Thompson v. White Water Valley R. Co.*, 132 U. S. 68, 40 Am. & Eng. R. Cas. 373. And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquires only a full equitable title. *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 43 Am. & Eng. R. Cas. 476. Where a company is incorporated to construct a railroad between two cities named as its termini, a mortgage given by it which, as expressed, is upon its line of railroad constructed or to be constructed between the named termini, together with all the stations, depot grounds, engine houses, machine shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, created a lien upon its terminal facilities in those cities and is not limited to so much of the road as is found between the city limits of those places. The stations, depot grounds, etc., in the terminal cities appertain to the railroad as fully as similar structures in places intermediate those termini. In the absence of restrictive words, such is the natural import, and therefore must be adjudged the intent and scope of a mortgage containing that description. This first mortgage contains not only the general terms referred to, but after them, and as if it were to avoid any possible doubt, adds: “And all its depot ground, yards, sidings, turnouts, sheds, machine shops, leasehold rights, and other terminal facilities now or hereafter owned by the said party of the first part.” It would be difficult to make language more full, accurate, and descriptive. *Willink v. Morris Canal Co.*, 4 N. J. Eq. 377; *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law, 205; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige (N. Y.), 554; *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339. There can be no doubt that by this mortgage a lien was created on the terminal facilities in the city of Toledo; and, as this mortgage was executed some months before the terminal trust mortgage, apparently it created a prior lien; and, if there were no other facts to be considered, the disposition of this case would be easy. That the parties receiving bonds under this mortgage would understand that they were to have a first lien on all terminal

Mortgage covering after-acquired property.

Property covered by mortgage—Terminal facilities.

facilities in Toledo then owned or thereafter acquired, is clear. That the railroad company also understood that it owned and was giving a prior lien upon such terminals is evident from the fact that in the year 1879 it executed a mortgage for \$1,204,000, and negotiated \$630,000 of the bonds secured thereby, which bonds and mortgages were taken up and satisfied out of the proceeds of the mortgage of January 17, 1880; and in the prospectus, issued for the purpose of inviting investors to purchase those bonds, was this statement: "Terminal advantages. The Toledo, Delphos and Burlington Railroad has the right of way through and down the very center of the city of Toledo. It enters the city near the Miami and Erie canal, and substantially follows the canal to Washington street; thence down Washington street to Swan Creek and to Lake Navigation, within three squares of the post-office. This franchise is very valuable and of very great importance to the business of the road, and adds greatly to the pecuniary value of the property of the corporation. No other road entering the city approaches so near to its center; none whose freight and passenger business is transacted so near to the business of the city. This franchise is considered valuable to the road, not only from the fact that it affords unusual business facilities, but because it becomes independent of other corporations, and renders its business secure, without submitting to a heavy tax on its traffic." Not only this, but when the mortgage of January 17, 1880, was in contemplation, and on December 12, 1879, when its execution was ordered, the resolution of the directors declared "that for the purpose of borrowing money for the use of the company to enable it to carry out the purposes for which it is organized and was consolidated, * * * and build, complete, equip, pay for right of way and depot grounds, and operate its railroad, it is expedient to prepare, issue, and negotiate a series of first mortgage bonds, amounting in the aggregate to \$1,250,000;" and "that, in order to rescue the payment of said issue of first mortgage bonds and the interest thereon, * * * the president shall also forthwith cause to be prepared a mortgage or deed of trust conveying * * * all this company's present and future to be acquired line of railroad, appurtenances, and equipment and income thereof, betweed said city of Toledo, in the state of Ohio, and the town of Kokomo, in the state of Indiana." No one can misunderstand these declarations. They expressed to every purchaser of a bond secured by this first mortgage a purpose to vest in him a prior lien on all the property of the railroad company, including its terminal facilities,—a lien superior to every incumbrance thereon. They unite, therefore, with the clear language of

the mortgage, the expressed intent of the mortgagor. To thwart this purpose, so obvious and expressed, there should be a clear disclosure of higher equity, and to the suggestions of that we pass.

The second—the terminal trust—mortgage was executed on June 21, 1880. On September 4, 1880, more than two months thereafter, the Toledo & Grand Rapids Railroad Company executed its mortgage to the Central Trust Company to secure, not its own indebtedness, but the bonds secured by the terminal trust mortgage, above referred to. This mortgage, in terms, conveyed the grantor's right of way within the city of Toledo,—property which is, in fact, a part of the right of way and terminal facilities of the Toledo, Delphos & Burlington Railroad Company. On November 29, 1880, George W. Ballou and wife executed a mortgage to the same trust company, conveying certain properties similarly situated and also as security for those terminal trust bonds. On April 12, 1881, the Toledo & Grand Rapids Railroad Company conveyed to the Toledo, Delphos & Burlington Railroad Company all its properties. The consideration of such transfer was \$265,477.86 cash, an amount supposed to be sufficient, and provided to pay all the indebtedness of the Toledo & Grand Rapids Railroad Company. So far as the property standing in the name of Ballou is concerned, he was the financial agent of the mortgagor, the Toledo, Delphos & Burlington Railroad Company; and while he took the title to some properties in his own name, the purchase was with moneys of the mortgagor. Hence, while he held the legal title, the full equitable title was in the railroad company, and that property became, therefore, in equity, subject to the lien of the first mortgage. Further, the mortgage from Ballou to the Central Trust Company, of date November 29, 1880, was really a tripartite agreement between Ballou, the Toledo, Delphos & Burlington Railroad Company, and the Central Trust Company, and recited that the mortgage to the trust company was in consideration of \$40,000 of these terminal trust bonds received by Ballou. So, not only was this purchase by Ballou made with the funds of the Toledo, Delphos & Burlington Railroad Company, but he received also \$40,000 of the terminal trust bonds. Further than that, as we read the record,—and there are 70 to 80 deeds and relinquishments of right of way contained in it,—apparently the title to the bulk of the right of way passed directly to the Toledo, Delphos & Burlington Railroad Company, and not to Ballou, nor to the Toledo & Grand Rapids Railroad Company, so that we have these facts before us: *First*. The title

Effect of
terminal
trust mort-
gage.

to the larger portion of the terminal facilities passed directly to the mortgagor, the Toledo, Delphos & Burlington Railroad Company. *Second.* All that part whose title was taken in the name of Ballou was paid for by the funds of the Toledo, Delphos & Burlington Railroad Company, and therefore it had the full equitable title, and he had only the naked legal title in trust for its benefit. *Third.* The incumbrance which he placed upon it in the tripartite agreement was not security for an independent lien, but simply additional security for the terminal trust bonds issued by the Toledo, Delphos & Burlington Railroad Company. *Fourth.* The mortgage given by the Toledo & Grand Rapids Railroad Company, which was generally of its right of way and terminal facilities, was not to secure an independent debt, but the already issued terminal trust bonds of the Toledo, Delphos & Burlington Railroad Company. *Fifth.* All the indebtedness of the Toledo & Grand Rapids Railroad Company was assumed and paid by the Toledo, Delphos & Burlington Railroad Company, as a consideration of the appropriation by the latter of all the franchises and property of the former. Whatever, therefore, may be said as to the scheme and plan of the parties who in the spring of 1880 were in control of the Toledo, Delphos & Burlington Railroad Company, the fact remains undisputed that its mortgage of January 17, 1880, covered, in terms, all subsequently acquired terminal facilities in the city of Toledo; that purchasers of bonds secured thereby were invited to invest, on the strength of representations by the company that it covered the terminal facilities; that the title to the larger portion of these terminal facilities passed directly and unincumbered by any one to the Toledo, Delphos & Burlington Railroad Company; that, as to those portions whose title passed to Ballou and the Toledo & Grand Rapids Railroad Company, the purchase price was paid by the Toledo, Delphos & Burlington Railroad Company; and that the mortgages which they respectively executed to the Central Trust Company were not given to secure independent debts, but simply as collateral to the terminal trust bonds.

We do not question the proposition invoked by counsel for appellant, that a mortgage with an "after-acquired property"

clause creates a lien upon property subsequently acquired only when it is acquired, and in the condition in which it is acquired, and subject to all existing liens; nor the other proposition, that the ownership by one corporation of the stock of another will not of itself prevent the creation of a new and independent lien upon the property of the latter, as adjudged in the case of *Williamson v. New Jersey S. R. Co.*, 28 N. J. Eq. 278, 29 N. J. Eq. 316.

Property sub-
jected to lien.

Yet we think those propositions are not decisive of the case here presented. The mortgagor in the two mortgages of January and June, 1880, held the legal title to a large portion of the terminal facilities, and was the equitable owner of substantially the rest. Its first mortgage, its expressed purpose, was a lien upon those terminal facilities. No lien was ever placed by the holders of the legal title on that portion of the right of way and terminal facilities which did not stand in the name of the Toledo, Delphos & Burlington Railroad Company, to secure any new and independent obligation. These collateral and subsequent mortgages were in terms only to strengthen the security already given by the terminal trust mortgage. If they had never been executed, can there be a doubt that on a foreclosure the trustee in either the mortgage of January 17, 1880, or the terminal trust mortgage, could have subjected to its lien all property in fact a part of the right of way and terminal facilities, whether the title of the company thereto was either legal or equitable? They, therefore, only put into writing that which was already and in equity the obligations resting on the property. So, whatever may have been the secret thought and scheme of the parties controlling the management of these railroad companies, we are of opinion that the various properties included in the right of way and terminal facilities became in fact subjected to the lien of the two mortgages of January and June, 1880, executed by the Toledo, Delphos & Burlington Railroad Company. At least, that is true of all properties whose title passed to the Toledo, Delphos & Burlington Railroad Company. Certain properties whose title did not thus pass were by the decree exempted from the operation of this lien. We think there was no error in the ruling of the circuit court, and its decree is affirmed.

Construction of Railroad Mortgages Covering After-Acquired Property.— See *New Orleans & Pacific R. Co. v. Union Trust Co.* (C. C.), 43 Am. & Eng. R. Cas. 458; *Thompson v. White Water Valley R. Co.* (U. S.), 40 *Id.* 373, note 379.

GLONINGER

v.

PITTSBURG & CONNELLSVILLE R. Co. *et al.**(Pennsylvania Supreme Court, January 5, 1891.)*

Mortgage Covering Property and Franchise—Validity.—Although a mortgage executed by a railroad company on its property and franchise is not operative as to the franchise, for want of authority to mortgage the franchise, yet it is operative as to the railroad and the specified property described therein and covered by its terms.

Express Authority to Mortgage—Power to Borrow Money and Issue Bonds.—Where a railroad company has express statutory authority to mortgage its property it need not have specific authority in order to borrow money and issue bonds. The purpose of a mortgage is to secure loans, and the power to borrow money and issue bonds is a necessary incident to the power to mortgage.

Objects of Encumbrance on Railroad—Construction of Charter.—The supplement to the charter of the defendant company authorized it to mortgage its road and property "for the purpose of carrying out the privileges granted by the act and the several supplements thereto, incorporating the same." *Held*, that the power of the company to mortgage its road and property so given, was not restrained to the mere physical structure completed at the time of the passage of such supplement to the company's charter.

Increase of Indebtedness by Corporation—Constitutional Provisions—Validity of Mortgage.—Section 7, art. 16, Pa. Const. of 1874, provides that "the stock and indebtedness of corporations shall not be increased * * * without the consent of the persons holding the larger amount in value of the stock * * * at a meeting held after 60 days' notice," etc. *Held*, that a railroad company having general power to mortgage its property, and chartered before the adoption of the constitution of 1874 is not bound by its provisions. *Held*, also, that although such company in 1868 accepted the terms of legislation which made it subject to the act of 1855 and to the constitutional amendment of 1857 authorizing the legislature to alter or annul charters of corporations, yet this fact is not sufficient to render the company subject to the constitutional provision.

Rights of Minority Stockholders—Receiving Benefit from Transaction.—Where the minority stockholders of a corporation had received no injury, but, on the contrary, benefits by the transaction complained of by them, they have no just cause of complaint, even though the majority stockholders are also benefited.

Issue of Bonds for Benefit of Another Company Owning Majority of Stock—Consideration.—The Baltimore & Ohio R. Co. owned a majority of the stock of the defendant company, and procured the latter to issue \$10,000,000, of bonds to it in consideration of a large indebtedness to the B. & O. R. Co. for rolling stock furnished, branch lines bought, etc. No improper means were used to procure the issue, although it was shown that the B. & O. R. Co., used the bonds when procured as security to float a loan made for its exclusive benefit. *Held*, that the bonds so issued were valid.

APPEAL from Allegheny County Court of Common Pleas.

D. T. Watson and William S. Pier, for appellants.
Johns McCleave, John S. Ferguson and George Shiras, Jr.,
for appellees.

GREEN, J.—It was contended for the appellant on the argument of this case and in the paper book that there was no power expressly given to the Pittsburgh & Connellsville Railroad Company to mortgage its franchise; and the conclusion was deduced that, as the mortgage in controversy included the franchise as well as the railroad and specific property of the company, the entire mortgage was rendered void. We do not assent to the proposition that there was no authority expressed or implied to mortgage the franchise, but the decision of that question is not necessary, because we do not, in any event, agree that, if the mortgage is not operative as to the franchise, it is therefore not operative as to the railroad and specific property described therein, and covered by its terms. If there was a lack of lawful power to mortgage the franchise, the only necessary result that would follow would be that the franchise would not be bound by the mortgage, and could not be sold under judicial proceedings upon it. But it certainly would not follow that, if there was lawful power to mortgage the railroad and specific property described in the mortgage, the mortgage would be entirely avoided as to it. At this time there is no practical question other than the validity of the mortgage in controversy. No proceedings and no sale of either the property or franchises of the railroad company under the mortgage have taken place. No ownership of the franchise is claimed, except by the company itself, and that claim is not questioned by any party to this controversy. Upon this subject the question raised upon these pleadings is abstract only. If the defendant corporation, the Pittsburgh & Connellsville Railroad Company, had lawful authority to mortgage the property described in that instrument other than the franchise, it was not deprived of that authority by the circumstance that the mortgage included some other property or right as to which the power did not exist.

The material question, then, is, did the company have the power to mortgage the property described in the instrument other than the franchise? If it did, the mortgage is not void for want of authority. The charter of this company, granted in 1837, (P. L. 185,) confers a power to mortgage in these words: "The Pittsburgh and Connellsville Railroad Company, and by the same name the subscribers, shall have perpetual succession, and all the privileges, franchises, and immunities incident to a corporation, may sue and be sued,

Mortgage of
franchise—
Validity of
mortgage on
property.

implead and be impleaded, in all courts of record and elsewhere, may purchase, receive, have, hold, and enjoy, to them and to their successors and assigns, lands, tenements, and hereditaments, goods, chattels, and all estate, real, personal, and mixed, of what kind or quality soever, and the same from time to time to sell, mortgage, grant, alien, or dispose of," etc. The power to mortgage is given in the most explicit language, and embraces all the property which the company may acquire or hold, "real, personal, and mixed, of what kind or quality soever." It is difficult to conceive how there could be a larger or more comprehensive description of the kind of property upon which the power to mortgage could be exercised than is contained in these words. They embrace every species of property known to the law; and the power itself is not subjected to any limitations, restrictions, or qualifications of any kind. No provision is made as to the manner in which the power should be exercised, and hence no particular formalities were required to be observed. An authentic act of execution by the proper officers of the company would seem, therefore, all that was necessary to a valid exercise of the power.

We cannot assent to the contention that, in addition to the power to mortgage, there must also be expressed a specific authority to borrow money and issue bonds therefor. The manifest purpose of a mortgage is to secure loans of money," and the power to borrow money, and to give the ordinary evidences of loans in the form of bonds, or other obligations to the same effect, is a necessary incident to the power to mortgage. But it is also a necessary incident to the right to build a railroad, and it is only essential to have the power to mortgage expressly granted, in order that it may be exercised for the purpose of securing indebtedness, whether arising from loans of money, or upon other considerations. Nothing to the contrary of this was decided in the case of *Pittsburg & C. R. Co. v. County of Allegheny*, 63 Pa. St. 126.

Additional power to mortgage was granted to this company by the fifth section of the act of 18th April, 1853, (P. L. 566,) in these words: "And the said railroad company are hereby authorized to mortgage or otherwise incumber their said road and any real and personal estate which may belong to it, for the purpose of carrying out the privileges granted by the act and the several supplements thereto incorporating the same." It was contended for the appellant that this power was limited to the purpose of carrying out the privileges granted by the incorporating and supplementary acts, and

Power to
borrow and
issue bonds.

Purpose of
encumbrance
— Provisions
of charter.

that those privileges were exhausted when the road, as then built, was finished. By the sixth section of the same act the company was authorized to extend their road to any point they may select in Somerset or Bedford counties, so as to form a connection with the Chambersburg & Allegheny Railroad, or any other railroad that may be constructed. Other powers of extension were granted by previous and subsequent legislation. The power to mortgage clearly included the railroad and all other real and personal estate of the company, without reference to the time of its acquisition, so long as the purpose was observed of carrying out the privileges of the company granted by the original act of incorporation, or any supplements thereto. So long as the acts done or proposed to be done are within the legalized powers of the company, whether before or subsequent to the passage of this act, the power to mortgage attaches. We cannot agree that it was restrained to the mere physical structure then completed. If a subsequent acquisition of rolling stock should become necessary, or the erection or lawful acquisition of branches in addition to those already possessed should take place, it cannot be doubted that the power to mortgage, conferred by this act, would be applicable. We are clearly of opinion that the statutes in question gave all the necessary power to mortgage the property of the company, and, therefore, that the mortgage we are considering cannot be adjudged void for lack of authority.

It was contended however, that it was void for the reason that it was given for an increase of indebtedness, and that this could not be done, except in accordance with the provisions of the constitution of 1874, and the general law passed in the same year to carry those provisions into effect. The particular point of non-compliance with the law was the omission to give notice for 60 days to the stockholders of a meeting to be held for the purpose of deciding the question of the proposed increase. In point of fact such a notice was not given, though the holders of stock to the amount of 33,303 shares out of a possible 38,888 shares attended at the meeting, and voted in favor of the mortgage. In the view that we take of this case, the discussion of this and several other questions raised and argued at much length becomes unnecessary. We are of opinion that the constitution and act of 1874 are not applicable to this company, so far as this subject is concerned. The seventh section of the sixteenth article of the constitution provides as follows: "No corporation shall issue stock or bonds except for money, labor done, or money or property actually received; and all fictitious in-

Increase of
indebtedness
— Constitution
provision not appli-
cable.

crease of stock or indebtedness shall be void. The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained, at a meeting to be held after sixty days' notice given in pursuance of law. The act of 1874 (P. L. 61) prescribes the method of proceeding in order to effect an increase of stock or indebtedness in conformity with the constitution.

We have seen that the right of the company to mortgage its property was complete, absolute, and without any conditions or limitations as to the manner of its exercise. There was nothing either in its charter or its supplemental acts, or in any general legislation prior to the constitution of 1874, which imposed any restrictions or formalities upon it in the exercise of its right to increase its indebtedness, or to make mortgages upon its property. Neither the act of 1855, nor the amendment of 1857, which gave power to the legislature to alter, revoke, or annul charters of incorporation when they were injurious to the citizens of the commonwealth, had any specific effect upon this particular chartered right of this company. It is true that, in 1868, the company accepted the benefit of an act passed in that year, authorizing it to build branches, and, having done so, it may be conceded, that it became subject to the operation of the act of 1855 and the amendment of 1857. This being so, the company was in the precise position of the Williamsport Passenger Railway Company, whose right to lay its tracks without the consent of the city of Williamsport was adjudged by the court in the case of Williamsport Pass. R. Co. v. Williamsport, 120 Pa. St. 1, 36 Am. & Eng. R. Cas. 125. That company was chartered in 1863, by a special law, which gave it the right to lay its tracks in the streets of Williamsport. There was nothing in its charter which required it to obtain the consent of the municipal authorities. In 1887 the company undertook to lay additional tracks on some of the streets not previously occupied for that purpose, and the city filed a bill to restrain it, on the ground that under the constitution of 1874 and act of 1878 the consent of the city was necessary to be obtained before the tracks could be laid. The court below granted the injunction upon their understanding of the decisions of this court in the cases of Pennsylvania R. Co. v. Duncan, 111 Pa. St. 352, 29 Am. & Eng. R. Cas. 354, and Philadelphia & R. R. Co. v. Patent, (Pa.), 5 Atl. Rep. 747. The charter of the Williamsport Passenger Railway Company having been obtained in 1863, it was, of course, subject to the operation of the act of 1855 and the amendment of 1857. Precisely the same argument was made before us then as is now made in

this case, to-wit, that the company, being subject to legislative control by force of the act of 1855 and the amendment of 1857, became thereby subject to the constitution of 1874, and the subsequent legislation to enforce it; and our decision in *Pennsylvania R. Co. v. Duncan* was cited and pressed upon as conclusive of the question and the case. But we did not take that view, and reversed the court below unanimously, the present chief justice delivering the opinion. We held there that the railway company's right was given to it affirmatively and expressly in its charter, and could not be taken from it, either by a legislature or a constitutional convention, except for the causes expressed in the act of 1855 or the amendment of 1857, to-wit, that the charter had become injurious to the citizens of the commonwealth. And we further held that the act of 1878 was not intended to enforce the amendment of 1857. At the end of the opinion we said: "Our conclusion is that the charter of the appellant is not affected by the constitution of 1874 or the act of 1878. It follows that it was error to grant the injunction." To show how entirely analogous that case is to this it is only necessary to place side by side the two constitutional provisions:

Article 17, § 9.

"No street passenger railway shall be constructed within the limits of any city, borough, or township without the consent of its local authorities."

Article 16, § 7.

"The stock and indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock first obtained at a meeting to be held after sixty days' notice given in pursuance of law."

The charter of the railway company conferred the right to lay tracks on the streets of Williamsport, and simply failed to require the city's consent to be obtained. The charter of the Pittsburgh & Connellsville Railroad Company conferred the right to mortgage its property, and imposed no formalities or restrictions upon the exercise of the right. It did not require any consent of the stockholders to be given. In the *Railway Case* the right conferred by the charter was the right to lay its tracks in the city without obtaining the city's consent. In the present case the right conferred by the charter was the right of the company to mortgage its property without obtaining the consent of the stockholders. There is no difference between the two cases, except that a right to lay a railway track was given in one, and the right to mortgage property in the other. The principles that determined the one are exactly applicable to the other. A brief citation from the opinion of Mr. Justice PAXSON in the *Railway Case* will suffice for this: "There is nothing in the com-

pany's charter which makes the consent of councils a prerequisite to the exercise of its corporate powers in the extension of its road. Hence we have the question clearly cut, whether its charter is affected by either the constitutional provision or the act of assembly referred to. If the charter of the company remains in full force as originally granted by the commonwealth, its right to extend its tracks as proposed is too clear for argument. It has been said by this court on more than one occasion that the constitution of 1874 did not *ipso facto* repeal charters. This principle was expressly ruled in *Hays v. Com.*, 82 Pa. St. 523, in a very clear opinion by our Brother GORDON, and the same thought was expressed by the same judge in *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352, 29 Am. & Eng. R. Cas. 354, where he said: 'We also agree that the framers of the constitution of 1874 did not intend to violate the laws of the federal government, or to repeal the provisions of any charter granted by the legislature of Pennsylvania.' That this case was not intended to assert the doctrine that the constitution repealed existing charters the extract I have given fully shows; nor was it intended to overrule *Hays v. Com.*, *supra*. It was urged, however, that appellant's charter post dates the constitutional amendment of 1857, which provides that 'the legislature shall have the power to alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law, whenever, in their opinion, it may be injurious to the citizens of the commonwealth, in such manner, however, that no injustice shall be done to the corporators;' and that the appellant's charter is subject to this provision and to appropriate legislation to enforce it. I concede all this, but I do not understand that the act of 1878 was intended to enforce this amendment, or to repeal the charter of the appellant. The amendment of 1857 did not give an arbitrary power to the legislature to repeal charters at will. It only authorizes such repeal for cause. It can only be done where the charter is injurious to the citizens of the commonwealth; and such reason should appear in some way as the moving cause which induced the legislature to take such action. And, even where such cause appears, the charter must be revoked or annulled in such manner, and no other, 'that no injustice shall be done to the corporators.'" Our Brother PAXSON, proceeding further, quotes from the opinion of Mr. Justice GORDON in *Hays v. Com.*, 82 Pa. St. 523, as follows: "As there is in this case no allegation of a breach of any condition under which the Pittsburgh & Castle Shannon Railroad Company accepted its charter, or that that charter is in any particular obnoxious to the welfare of the citizens of this commonwealth,

it cannot be successfully urged that it may be reversed or abrogated by any state authority whatever. But the constitutional convention claimed for itself no such power; on the other hand it has expressly set down in § 2 of the schedule that all rights, actions, prosecutions, and contracts shall continue as if the constitution had not been adopted. And by the second section of article 16 it is manifest that the convention did not intend to subject any private corporation to any of the provisions of the constitution which might in any degree change the charter thereof. If otherwise, why say: 'The general assembly shall not remit the forfeiture of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution.' This section is so comprehensive and clear that nothing is left for surmise or doubt. Charters of private corporations are left exactly as the new constitution found them, and so they must remain until the companies holding them shall enter into a new contract with the state by accepting the benefit of some future legislation."

This decision was followed in the case of *Ahl v. Rhoads*, 84 Pa. St. 319, where the power of a bank to secure a debt by a mortgage upon its property, executed without the consent of its stockholders, was impeached, upon the authority of the same seventh section of the sixteenth article of the constitution that is invoked against the mortgage given in the present case. The charter of this bank was obtained in 1862, and was, of course, subject to the act of 1855 and amendment of 1857. Yet we held that "the power of this bank to secure its debt to the plaintiff in the mode adopted here has not been destroyed or impaired by the constitutional provision and the legislation under it which the defendants have invoked." And also that "the corporate powers and privileges of this bank were created and defined by the act of incorporation passed on the 11th of April, 1862, and the general legislation then in force." In *Lewis v. Jeffries*, 86 Pa. St. 340, a mortgage given by a bank incorporated in 1871, to secure a loan, and without the consent of the stockholders, was impeached also upon the ground that the mortgage was void by the seventh section of the sixteenth article of the constitution. An injunction was granted by the court below, restraining the holder of the mortgage from collecting it, upon the express ground that the constitution of 1874 was applicable and avoided the mortgage. It was argued for the appellant that the constitution was not intended to apply to corporations already in existence. This court reversed the court below, holding that the injunc-

tion should be dissolved. *Hays v. Com.*, *supra*, was a *quo warranto* to inquire by what authority certain officers of a railroad company, who had been elected by means of cumulative voting, which is allowed by the constitution of 1874, held title to their office. The company was chartered in 1871 under the provisions of the act of 4th April, 1868, (P. L. 62.) and a special act approved April 21, 1872. The court below sustained the title of the officers who were elected by the cumulative system. It was contended by the learned counsel for the appellant (the same who now appears for the present appellant) that the new constitution was not retroactive, and did not apply to corporations already in existence; that the second and tenth sections of article sixteen, and the second section of the schedule, were entirely inconsistent with the view that the constitution was intended to embrace corporations previously in existence; that the charter was a contract with the state, which could not be impaired; and that the amendment of 1857 had no application, because it was only authority to "revoke, alter, or annul" charters which were injurious to the citizens, and so as to do no injustice to the corporators. All of these propositions were accepted and adopted by this court in the opinion delivered by our Brother GORDON. Thus, in the four cases cited, we have held that the constitution of 1874 was not applicable of itself to previously existing corporations, and that, too, although the charters in all of them were granted subsequently to the act of 1855 and the amendment of 1857. We followed them all in *Baker's Appeal*, 109 Pa. St. 461, and went still further, holding that it was not within the power of the directors of a corporation to formally accept the provision of the fourth section of article 16 provided for cumulative voting, so as to bind the stockholders. In every one of these cases the decisions of the court below were reversed, holding the new constitution to be applicable; and in the last our Brother STERRETT said, speaking of *Hays v. Com.*: "For reasons given at length in that case, and which need not now be repeated, the authority thus conferred on the stockholders is a vested right, with which the constitution of 1874 has not intended to interfere except in the manner therein provided." In view of the provisions of the second section of the sixteenth article, that "the general assembly shall not permit the forfeiture of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution;" and of the second section of the schedule, that "all laws in force in this commonwealth at the time of the adoption of this

constitution not inconsistent therewith, and all rights, actions, prosecutions, and contracts, shall continue as if this constitution had not been adopted;" and in view of the repeated decisions of this court that neither the constitution of 1874, nor the legislation to carry it into effect, had any application to existing charters,—it is our plain duty to decide, as we now do, that the seventh section of the sixteenth article is not applicable to the Pittsburgh & Connellsville Railroad Company, so as to effect its rights and privileges under its charter; and, further, that its acceptance of legislation in the year 1868 brought it only within the operation of the act of 1855 and the amendment of 1857, but had no effect to bring it within the provisions of the constitution of 1874.

But the case of *Pennsylvania R. Co. v. Duncan*, 111 Pa. St. 352, 29 Am. & Eng. R. Cas. 354, is pressed upon our attention with much earnestness by the learned counsel for the appellant, and it is claimed, with much confidence, to control the present contention. That case was an action to recover damages for an injury inflicted upon the plaintiff by the construction of the defendant's road immediately along the plaintiff's property, but not taking any of it. The new constitution, by the eighth section of the sixteenth article, gave a remedy for injuring as well as for taking or destroying private property. The injury was inflicted upon the plaintiff in that case after the adoption of the constitution of 1874, and the question was whether the company was liable. Immunity was claimed for the company on the ground that it was not liable for injuries without taking, by the law as it stood before the adoption of the constitution of 1874, and therefore could not be made liable by force of its terms. Without going into minute particulars of the controversy, it will be perceived at once that it was a contest between a citizen who had been injured by the action of the company in constructing its road and the corporation inflicting the injury, with a full knowledge of the state of the law as it existed at the time of the injury. The very wide difference between the question thus raised and the question at issue in this case becomes manifest upon the slightest consideration. The question there was as to the right of a citizen to recover damages for an injury without a taking, which right was given to him by the law in force at the time the injury was inflicted, from the party that caused it. The company claimed immunity, not by virtue of any chartered right, expressly given, to commit the injury without liability, but simply because, by the law as it was before the constitution was adopted, there was no such liability; and such liability could not be imposed upon it, even for its own subsequent act, without a violation of its rights under the law

as it was. But its rights under the pre-existing law were altogether negative, and were in no sense the result of a legislative grant of power to inflict the injury without liability. There never was such a grant of power to the defendant company in the Duncan Case, and hence there was no question involved of taking away one of the company's chartered rights. Its freedom from liability for a consequential injury was simply the result of the want of a remedy for the person injured. Our previous constitutions gave no remedy except for a taking; and this court was obliged to hold, and did hold repeatedly, though with much regret often expressed, that the law gave no remedy for a mere injury without a taking. Occasionally it happened that a remedy was given for a consequential injury either in the charter or in some supplement conferring additional privileges, and then the courts made haste to administer relief. This was the case in *Monongahela Nav. Co. v. Con.* 6 Pa. St. 379, where, in a supplemental act granting new privileges to the company, the legislature reserved the right to alter, amend, or annul the charter, and afterwards passed a law in 1844 directing the company to make amends for any damages done or to be done to lands on the Monongahela river, or its branches, or tributary streams, by overflowing the same. Then a second action was brought for the recovery of the very damages which had been refused in the first action, and this court held there could be a recovery, because the company had accepted the benefits of the supplemental act of 1839; and because of the reservation of the right of legislative control in that act we held the company was bound by the subsequent legislation giving the remedy. Upon this case our Brother GORDON rested his opinion in the Duncan Case, holding that the two cases were in the same category, and that the defendant in the Duncan Case was subject to the act of 1855 and the amendment of 1857, and the convention or the legislature "had the power to subject the company's exercise of the right of eminent domain to the provision that it make just compensation, not only for the property which it might choose to take, in the strict sense of that word, but also for such as it may injure or destroy." No question arose in the case as to the taking away of an expressly vested charter right of the company, and in point of fact they have no such charter right upon the subject in controversy. They were simply held liable to make compensation for an injury which they voluntarily inflicted at a time when, by the organic law of the state, such an injury could not be inflicted without making compensation. Neither that question nor any analogous question arises upon the present record. We hold, therefore, that the right of the Pittsburgh

& Connellsville Railroad Company to execute the mortgage in question is not affected by the provisions of the constitution of 1874, or the legislation to enforce it. It is almost needless to add that there was no acceptance of legislation subsequently to 1874 by the Pittsburgh & Connellsville Railroad Company. *McAboy's Appeal*, 107 Pa. St. 548, makes no decision on that subject. The decisions of this court in *Lewis v. Hollahan*, 103 Pa. St. 425, and *Pennsylvania R. Co. v. Bowers*, 124 Pa. St. 183, 37 Am. & Eng. R. Cas. 353, are not kindred to the *Duncan Case* nor to this, and they do not raise any similar question. The foregoing considerations dispose of the contentions respecting the lawful power of the Pittsburgh & Connellsville Railroad Company to execute the mortgage in question.

The bill of the plaintiffs contained a number of allegations of fraud in fact on the part of the company, and also on the part of the Baltimore & Ohio Railroad Company acting in combination with them in conceiving and carrying out the plans for the concoction and execution of a scheme to give the bonds and mortgages for \$10,000,000 for the exclusive benefit of the Baltimore & Ohio Railroad Company, a majority stockholder, and to the prejudice and injury of the Pittsburgh & Connellsville Railroad Company and the minority stockholders. Upon the hearing before the master an immense amount of testimony was given, upon which the master has made a most elaborate and exhaustive report. He has considered and reviewed all the allegations made by the plaintiff, and the argument submitted in support of the plaintiff's contentions respecting them, pursuing a most searching and extending investigation into them all. In conducting the work of his report he has furnished us with a minute and detailed history of the Pittsburgh & Connellsville Railroad Company, its origin, its construction, its extension, its business as it was from time to time, down to the date of the proceedings in this case; and also a similar history of all the branch roads which were purchased from the Baltimore & Ohio Company by the Pittsburgh & Connellsville Railroad Company, which purchase constituted a part of the transaction in question. After completing his very elaborate and highly valuable discussion and presentation of the testimony, he makes the following most important findings with respect to the whole of it:

"In concluding this extended and somewhat laborious review of the evidence in the case the master is constrained to say that the case of the plaintiffs, as made in the pleadings, has few features in common with the case presented by the evidence. It seems to the master to be improbable that the

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plaintiffs knew when they filed their bill that there was a judgment in the circuit court of the United States against the Pittsburgh & Connellsville Railroad Company in favor of the Baltimore & Ohio Railroad Company for more than \$4,000,000; that they had any knowledge of the sale by the latter company to the former of rolling stock equipment to the amount in value of more than \$1,200,000; or that the plaintiffs had any real knowledge of the value to the Pittsburgh & Connellsville Railroad Company of the several branch lines purchased by that company of the Baltimore & Ohio Railroad Company, or of the circumstances under which they had been built or acquired, though all the evidence reviewed was fairly admissible under the pleadings. Be this as it may, the allegations of fraud which constitute the *gravamen* of the plaintiff's bill have not been sustained by the evidence, either as respects the particular transactions averred, or the conduct of the Baltimore & Ohio Railroad Company in its relations to the Pittsburgh & Connellsville Railroad Company in any matter or at any time. It has not been proved; nor is there a *scintilla* of evidence tending to prove, that the income of the Pittsburgh & Connellsville Railroad Company has ever been fraudulently or dishonestly diverted from the treasury of that company into that of the Baltimore & Ohio Railroad Company. There is no proof of collusion or fraudulent connivance by the directors or officers of the Pittsburgh & Connellsville Railroad Company with the Baltimore & Ohio Railroad Company or its officers or agents in the issue and making of the bonds and mortgage, called the 'second consolidated mortgage bonds' of the former company for \$10,000,000, nor in the disposition of the proceeds of those bonds, nor of any weak subserviency or accommodating acquiescence in any plan or project of the Baltimore & Ohio Railroad Company leading up to that transaction; nor is there any evidence of fraud, dishonesty, or hard dealings on the part of the Baltimore & Ohio Railroad Company, its officers or agents, in any matter connected with this business, nor of any attempt to improperly influence the directors or stockholders of the Pittsburgh & Connellsville Railroad Company. The purposes for which the bonds were authorized and issued were lawful corporate purposes. The debt paid was an honest debt, and amounted to \$4,688,282.67. The equipment purchased was necessary, and purchased at a fair price, which was \$1,212,500. The branch roads thus acquired were indispensable to the Pittsburgh & Connellsville Railroad Company, and fairly worth what was paid for them, to-wit, \$2,803,329.63. The ten million of second consolidated mortgage bonds were taken at their full value by the Baltimore &

Ohio Railroad Company, which was ninety per cent. of the face or par value, and they were received in full payment of the aforementioned debt, and of the prices and sums of money for which the rolling stock equipment and the said stocks and bonds were sold to the Pittsburgh & Connellsville Railroad Company. It is also proven that the Baltimore & Ohio Railroad Company paid into the treasury of the Pittsburgh & Connellsville Railroad Company the sum of \$295,977.90, the residue of the proceeds of the sale of the second consolidated mortgage bonds for \$10,000,000, which, with the amount paid on account of the debt, \$4,688,282.67, of the purchase of the rolling stock equipment, \$1,212,500, and of the purchase of the stocks and bonds of the branch roads, \$2,803,239.63, aggregate the sum of \$9,000,000, being ninety per cent. of the par or face value of the bonds for \$10,000,000. It is admitted that the Baltimore & Ohio Railroad Company has been the holder of a large majority of the shares of the stock of the Pittsburgh & Connellsville Railroad Company ever since the year 1870; but there is no evidence that it ever exercised its power as such majority stockholder to elect directors of the latter company in its own interest, and against the interests of the minority stockholders. There is no evidence that the Baltimore & Ohio Railroad Company influenced or attempted to influence the directors of the Pittsburgh & Connellsville Railroad Company in any matter or thing by which its own interests might be promoted at the expense of or to the injury of the minority stockholders; and certainly no evidence of such influence, or attempted influence, on the directors of said company in the matter of the making and issuing of the \$10,000,000 consolidated mortgage bonds, nor in the purchase of the rolling stock equipment, nor in the purchase of the stocks and bonds of the branch lines aforesaid. But there is much evidence of large advances made by that company, and also of large expenditures by it, for the benefit of the Pittsburgh & Connellsville Railroad Company, in the advantages of which all the stockholders shared, according to their respective holdings. The evidence discloses nothing proving or tending to prove that the Baltimore & Ohio Railroad Company, as the majority stockholder, dictated the policy of the Pittsburgh & Connellsville Railroad Company, or operated the railroad of that company in its own interests, to the prejudice or against the interests of the minority stockholders."

If these findings are true, they absolutely destroy the plaintiffs' case. We have patiently and carefully read and examined the whole of the master's report, and the evidence upon which he makes his findings, and we have read and consid-

ered attentively the whole of the argument of the learned counsel for the appellants with reference to these findings, and we are obliged to say that, in our judgment, the master is fully and entirely sustained by the overwhelming weight of the testimony. Much stress is laid upon the fact that the mortgage and bonds were desired for use, and were actually used, by the Baltimore & Ohio Railroad Company in raising money for their own purposes; and the inference is drawn that this was an illegitimate use of the securities rendering void the whole transaction. We cannot agree to this view of the subject. If the Baltimore & Ohio Company furnished a full and fair consideration for the bonds it received, and if, upon the whole facts of the case, the transaction was not injurious to the interests of the Pittsburg & Connellsville Company, the bonds were the lawful property of the Baltimore & Ohio Company, subject to any use they might see fit to make of them; and whether the use to which they did put them was beneficial to that company was not a question of material circumstance in considering the validity of the transaction. Upon the question of the character and quality of the consideration furnished by the Baltimore & Ohio Company the report of the master is most full and satisfactory. He finds that by means of this mortgage, the Pittsburg & Connellsville Railroad Company paid off in full a debt of \$4,688,282.67, which it honestly and fairly owed to the Baltimore & Ohio Company, and for which the latter company had obtained a judgment against it in the circuit court of the United States, and which the Baltimore & Ohio Company was perfectly at liberty to proceed to collect by legal process at any time. In addition to that, the Pittsburg & Connellsville Company received from the Baltimore & Ohio Company rolling stock equipment, all of which is minutely described in the testimony and in the report, at a valuation of \$1,212,500, when it was in reality worth a considerably larger sum. And the master further finds that it was of much more advantage to the Pittsburg & Connellsville Company to be the owner of this equipment than to be paying a large annual sum for the use of it, as it had been doing for a number of years. All the figures are given in the report, and the testimony from which they are drawn, and they substantiate the finding beyond question. The master further finds that the bonds and stocks furnished by the Baltimore & Ohio Company to the amount of \$2,803,239.63 were the bonds and stocks of tributary roads, which were indispensable to the Pittsburg & Connellsville Company, and vital to the successful prosecution of its business. The evidence upon this subject is very extended, and it is treated at great length in the report, where the reasons

for the master's conclusions are set forth with an unanswerable force. He shows that the price at which these securities were taken was a fair and moderate valuation, and that the company was greatly benefited by their acquisition. The master fully justifies the discount of 10 per cent. at which the bonds of the Pittsburgh & Connellsville Company were taken, by showing that they were secured by a second mortgage only, and with the rate of interest at 5 per cent. The testimony of witnesses proves conclusively that such a bond could not be floated at so high a percentage as 90 on the market. Upon all these findings the sustaining testimony is ample, and most of it entirely uncontradicted. It is quite unnecessary to review it in detail in this opinion. We are entirely satisfied with the correctness of the master's findings upon all these matters. It thus appears that the Pittsburgh & Connellsville Railroad Company was able to pay, and did pay, by means of the mortgage and bonds in question, an immense overdue debt of more than four millions of dollars, and acquired title to an indispensable equipment, and to the stocks and bonds of several tributary roads essential to its success. It paid no money; it gave only promises to pay money at the end of 40 years. How any minority stockholders could suffer by such an arrangement it is impossible to discover. That the Pittsburgh & Connellsville Company was greatly benefited by it cannot be doubted. From its very infancy the besetting trouble of this company was its want of money and credit. On this account it was unable to build its original road. It was subsequently unable to pay for its necessary repair. It was unable to build its extension to Cumberland; and it was utterly unable to build or purchase any of the feeders whose traffic was absolutely essential to its success. In all these emergencies it was helped from the beginning, with money and equipment, and in the construction of the feeders, by the Baltimore & Ohio Railroad Company. True, it was to the interest of that company to sustain and assist this one, but that circumstance does not belittle in any degree the value and great advantage of the assistance thus given. It has kept the Pittsburgh & Connellsville Company alive, and constantly increasing in business and capacity, until it is now a firmly established and self-sustaining company of great and growing importance in the railroad world. In view of these considerations, we do not think it requisite to engage in a minute or protracted discussion as to the law in relation to the duties of majority stockholders and the rights of minority stockholders. When the latter have received no injury, but, on the contrary, benefits, by the transaction called in question, they have no just cause

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of complaint, even though the majority stockholders are also benefited. Such has been the finding of the master in this case, and it has been confirmed by the learned court below. The conclusions there reached appear to us to be fully sustained by the testimony, and they meet with our approval. The decree of the court below is affirmed, and the appeal dismissed at the costs of the appellant.

WILLIAMS, J. (*concurring*).—I concur in this judgment, because I think the findings of fact made by the master and approved by the court below fully justify it. The further reasons given in the opinion of the court just filed I have not considered, and am not now able intelligently to assent to or dissent from them. For this reason I prefer to state the ground of my concurrence.

MCCOLLUM, J.—I concur in the judgment for the reasons above stated.

Power of Railroad Company to Mortgage Property and Franchise.—Railroad companies are created to answer a public object and are bound to the state for the performance of their public duty. There can be no act which would amount to a renunciation of their duty to the public or which would directly or necessarily disable them from performing it. They, therefore cannot convey away their franchises or corporate rights, nor the track and right of way which they take and hold for the necessary use of their road. *Pierce v. Emery*, 32 N. H. 484. Upon this principle the law is well settled that a railroad company cannot, without special authority, mortgage its franchises and its property essential to the exercise thereof. *Arthur v. President, etc.*, 9 S. & M. (Miss.), 394. But the rule has been applied with the greatest strictness to railway franchises. It has been stated very broadly by the supreme court of Massachusetts. A corporation created for the very purpose of constructing, owning, and managing a railway for the accommodation and benefit of the public, cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of its general franchise to be a corporation, or of the subordinate franchise to manage and carry on its corporate business without which its franchise to be a corporation can have little more than a nominal existence. *Richardson v. Sibley*, 11 Allen, (Mass.), 65; *Shrewsbury & B. R. Co. v. London & N. R. Co.*, 6 H. L. Cas. 136; *York & Maryland Line R. Co. v. Winans*, 17 How. (U. S.), 39; *Pierce v. Emery*, 32 N. H. 504; *Hall v. Sullivan R. Co.*, 21 Law Reporter, 140; *Worcester v. Western R. Co.*, 4 Metc. (Mass.), 566; *Commonwealth v. Smith*, 10 Allen, (Mass.), 448; *Coe v. Columbus P. & I. R. Co.*, 10 Ohio St. 732. *Arthur v. President, etc.*, 9 S. & M. (Miss.), 394. A corporation can transfer its franchise only so far as authorized by law. *Wood v. Bedford, etc.*, R. Co. 8 Phila. (Pa.) 94. A railroad company is not authorized by common law to mortgage its franchises without further authority than is conferred by its act of incorporation. *Commonwealth v. Smith*, 10 Allen (Mass.), 448. In *McAllister v. Plant*, 54 Miss. 106, the question whether a railroad company can mortgage its franchise in the absence of statutory authority was considered but not decided. It has been argued that since mortgages are in some sense property, the power to mortgage all property is therefore power to mortgage all franchises. This argument, however, has been held to be unsound. *Pullan v. Cincinnati & C. A. R. Co.*, 4 Biss. (C. C.), 35. Likewise a street

railway company has no power to mortgage its franchise, road, or property, without legislative authority. *Richardson v. Sibley*, 11 Allen, (Mass.), 65. And a general business corporation, without some statute allowing it, can neither sell nor mortgage its franchise. *Carpenter v. Black Hawk G. M. Co.*, 65 N. Y. 43; *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.), 27, 42 Am. Dec. 315; *Arthur v. President, etc.*, 9 S. & M. (Miss.), 394, 48 Am. Dec. 719; *New Orleans, etc., R. Co. v. Harris*, 27 Miss. 517; *Stewart v. Jones*, 40 Mo. 14.

A luminous exposition of the reason of the law is given by HOAR, J., of the supreme court of Massachusetts in *Commonwealth v. Smith*, 10 Allen, 448. He said: "But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body, of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using and taking tolls and fares upon the same are alienated, its whole power to perform its most important functions is at an end. A manufacturing company may sell its mill and buy another; but a railroad company cannot make a new railroad at its pleasure."

In Maine the doctrine that a railroad company cannot mortgage its franchise without legislative authority has been questioned. "The whole argument" said WALTON, J., "seems to have no greater force than this, that it is dangerous to the public interest to have the powers and privileges conveyed by a railroad franchise transferred from the original incorporators to a new body. But when we consider how little importance is attached to the persons of the original corporators, how soon death must, and other circumstances may remove them from all participation in the affairs of the road, how constantly those who have the active management of it are in fact being changed, we see how little practical merit this argument has. * * * Is there any reason to suppose that if a mortgage should by a foreclosure transfer the franchise to new hands, that as capable men would not be appointed to manage the road as before? Would not bondholders be as interested and as capable of appointing suitable managers as the stockholders? Does any one fear that the public interest would not be as safe with the former as the latter? Why then is it dangerous to the public interest to allow such a transfer? We confess that after giving the matter much thought, the doctrine that all railroad mortgages made without the consent of the legislature are illegal and void because they may operate as a permanent transfer of the corporate powers form the original corporators to another body, seems to us to have little to commend it and much to condemn it." *Shepley v. Atlantic & St. L. R. Co. et al.*, 55 Me. 395. See also *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9.

The cases in which railroad mortgages have been adjudged invalid do not countenance any doubt of the power of a railroad company to sell and convey, and mortgage whatever property it may hold, not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and manage a railroad that the alienation would not tend to disable the corporation from performing the public duties imposed upon it. *Hendee v. Pinkerton*, 14 Allen, (Mass.), 381. And it has been said by the supreme court of New Hampshire, that there is nothing in the nature of the business of a railroad, or in its relation to the public which would prevent it from making a valid mortgage of its personal property not affixed to the road, although used in the operation of it. Instead of disabling the road from performing its public duty such a mortgage might assist in doing it in the same way that other corporations or individuals are aided in carrying on their business by mortgages of their property. *Pierce v. Emery*, 32 N. H. 484. A corporation which is authorized to hold lands for depots and storehouses, as well as for railroad purposes, and to allow other railroad corporations to establish depots upon its premises and sell or lease the land necessary therefor, may lawfully mortgage lands held by it, and not required for railroad purposes, to secure bonds issued by said corporation. *Hendee v. Pinkerton*, 14 Allen, (Mass.), 381.

The power to transfer corporate privileges and property by way of mortgages is readily conferred by legislature upon corporations having special privileges entrusted to them for public uses; or, a mortgage made without such authority is usually confirmed by the legislature whenever such confirmation is asked for. *Jones, Corporate Bonds and Mortgages*, § 6; *St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297; *Richards v. Merrimack & C. R. Co.*, 44 N. H. 127. A railroad company whose charter gives it the right "to acquire, alien, transfer and dispose of property of every kind" may mortgage its property. The power to sell carries with it the power to mortgage. *McAllister v. Plant*, 54 Miss. 106. And a railroad company having a general power to mortgage its road may mortgage any part of it. *Pullan v. Cincinnati & C. A. R. Co.*, 4 Biss. (C. C.), 35. So where a railroad company was authorized by its charter to borrow money, etc., and to execute "such securities in amount and kind" as it might deem expedient, *held*, that it might mortgage its entire road with its franchises, and all its property including all future acquisitions. *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551.

In *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, it was held that a railroad company organized under a statute providing that the corporation might "acquire and convey at pleasure all such real estate as may be necessary and convenient to carry into effect the object of the incorporation," has no power to alienate its franchise to be a corporation or its franchise to construct and maintain its road and receive compensation for the transportation of persons and property, nor any interest in real estate acquired and held solely and exclusively for the purpose of the exercise of such franchise.

Legislative authority to mortgage includes the power to make a deed of trust in the nature of a mortgage. *Pullan v. Cincinnati & C. A. R. Co.*, 4 Biss. (C. C.), 35. And the power to pledge the franchises and rights of a railroad company, implies as incident thereto, the power to pledge everything that may be necessary to the enjoyment. *Phillips v. Winslow*, 18 B. Mon. (Ky.), 431. But a railroad company having by its charter only power to mortgage its real estate, will not be presumed to have authority to mortgage its franchise. *Randolph v. Wilmington & R. R. Co.*, 11 Phila. (Pa.), 502. So authority given a railroad company to mortgage its "road, income and other property" does not authorize a mortgage by a railroad company of its franchises. *Pullan v. Cincinnati & C. A. R. Co.*, 4 Biss. (C. C.), 35.

In Iowa it was provided by statute that railroad companies should have authority to encumber their real and personal property, such as lands held for right of way, depot buildings, rolling stock, revenues, and the like, including the future earnings, accessions, and acquisitions of their respective road. The supreme court doubted whether this authorized a railroad company to pledge its franchise by mortgage. *Dunham v. Isett*, 15 Iowa, 284.

The use of the words "dispose of" in the act of congress incorporating the Union Pacific R. Co., contemplates a use of the company's lands granted different from a sale, and a mortgage is such use. *Platt v. Union Pacific R. Co.*, 99 U. S. 48.

An express authority to mortgage for certain purposes does not necessarily negative or qualify a general authority to borrow for other purposes, for which the implied powers of a corporation are usually sufficient. *Jones, Corporate Bonds and Mortgages*, § 6; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472.

But in *Grand Junction R. Co. v. Bickford*, 23 Grant's Ch. (Ont.), 302, it is held that a railroad company having authority to borrow such sums of money as might be expedient for completing, maintaining, and working the railway, and to make bonds, debentures, and other securities, and to sell the same, and to hypothecate, mortgage or pledge the lands, tolls, revenues, and other property of the company, cannot make a mortgage for any purpose not embraced in the terms of the act, and, therefore, cannot make a mortgage to secure a debt which is not a debt of the company. See also *Bickford v. Grand Junction R. Co.*, 1 Sup. Ct. Can. Rep. 696. A mortgage executed 25 years after the railroad was completed and in full operation, will not be presumed in the absence of proof or allegation to have been executed under a power conferred by the charter to borrow money and execute mortgages for the purpose of completing the road and equipping it with everything necessary for its full operation. *Frazier v. East Tenn., Va. & Ga. R. Co.*, 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

Where existing railroad companies consolidate, the new corporation having rights and power of the old companies succeeds to their powers to issue bonds and to mortgage their property. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199. The provision of the Tennessee Act of March 24, 1887, relative to the consolidation of railroad companies, that no company shall have power to create a mortgage or other lien which shall have priority over any claim for timber furnished, for work or labor done, or for injury to person or property, is not impliedly repealed by the provision of the subsequent act of March 15, 1881, which authorizes railroad companies in general terms to mortgage their roads without any such restriction. The provision of the Tennessee Act of 1877, that consolidated railroad companies should not create mortgage liens which should be prior to claims for injuries to person or property, is not applicable only to such consolidations as were thereafter effected. *Frazier v. East Tenn., Va. & Ga. R. Co.*, 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

The power to mortgage conferred by statute to a railway company has reference only to such lands and property as the company may lawfully acquire, and cannot therefore include such as are not necessary to the purposes of the road. But a railroad corporation having authority to receive land in payment of subscriptions to stock, provided that so much land as may not be necessary for the use of the road shall be sold within a reasonable time, may mortgage such land if the property be not thereby placed in such condition as to put it out of the power of the company to comply with the terms of the statute. *Taber v. Cincinnati, L. & C. R. Co.*, 15 Ind. 459; *Jones on Corporate Bonds and Mortgages*, § 12.

Under Acts Tenn. 1847-48, p. 195, § 15, granting the railroad company incorporated by that act power to borrow money to complete its road and

secure it by mortgage, this power to mortgage is exhausted on the completion of the road, and hence no contract is violated by Acts Tenn. 1877, chap. 72, § 3, which was passed after such completion, and provides that no railroad company shall have power to create a mortgage which shall be valid against certain classes of judgments therein enumerated. *East Tenn., Va. & Ga. R. Co. v. Frazier*, 139 U. S. 288, affirming s. c. 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

FARMERS' LOAN & TRUST CO.

v.

GREEN BAY, WINONA & ST. PAUL R. CO.

(*U. S. Circuit Court, E. D. Wis., March 23, 1891, 45 Fed. Rep. 664.*)

Mortgage—Priorities—Claim for Causing Death.—A claim against a railroad company for negligently causing the death of an employe is not entitled to priority of payment over a precedent mortgage. *Disapproving Dow v. Memphis & L. R. R. Co.*, 17 Am. & Eng. R. Cas. 324.

IN EQUITY.

Upon the intervening petition of Emily Franck, administratrix, etc. The bill is filed to foreclose a trust-deed executed by defendant to complainant on the 1st day of September, 1881, upon its line of railway, to secure its bonds of even date, aggregating \$1,600,000, maturing in 1911, or at the option of the trustee, upon default in payment of interest. The interest of the bonds was payable semi-annually on the 1st days of February and August in each year. Upon default in the payment of interest, continuing 30 days, the trustee at its election might, and, upon request of the holders of one-fourth in amount of the bonds, should, take possession of the mortgaged premises, and dispose thereof at sale, as provided. Default occurred in the payment of interest due August 1, 1888, continued after default for more than 30 days, and in all subsequently maturing interest. On the 31st of July, 1890, the trustee, after proper request of the bondholders, demanded and received possession of the mortgaged premises, electing to treat as matured the entire principal sum of the bonds, and has since operated the railway. On the 14th August, 1890, the trustee filed this bill to foreclose. On the 18th of August an order of the court, entered by consent of the parties, affirmed the possession of the trustee, authorizing its continuance in possession under the protection of the court, and conferred upon the trustee the usual powers and duties of a receiver. No provision was made by the order with respect to the floating indebtedness of the railway company. On the 5th day of January, 1891, Emily

Franck filed her intervening petition, representing that Martin Franck, a conductor in the service of the railway company, lost his life on the 15th day of April, 1890, in the discharge of his duty, without fault on his part, and solely through the neglect of duty of the railway company; that he left a dependent father; that the railway company is insolvent; and that she, as administratrix of the estate of the deceased, prefers this petition to obtain for the father proper indemnity for the loss of the son, rightfully demandable under the laws of Wisconsin. The complainant takes issue with the petition, and alleges the superiority of the lien of its mortgage. The petitioner now moves the court to institute necessary proceedings to establish the liability for the death, and the amount recoverable therefor, claiming that such amount, when ascertained, constitutes a proper charge upon the income and *corpus* of the property, superior to the lien of the trust-deed.

G. W. Hazelton, for petitioner.

Winkler, Flanders, Smith, Bottom & Vilas, for trustee.

JENKINS, J.—The objection that the application is premature cannot be sustained. It is not essential that the demand should be first established in a suit at law against the railway company. If the petitioner's demand be a proper charge upon the fund in the hands of the receiver growing out of the operation of the railway, it is properly cognizable in this court, which, as a court of equity, has through its receiver possession of the railway, and exclusive control of the fund realized from its operation. In such case it pertains to this court to adjust all demands upon the fund, and to that end may permit an action at law, or direct the trial of a feigned issue. *Barton v. Barbour*, 104 U. S. 126. The act of congress permitting suit against receivers appointed by a federal court, without leave of the appointing court, is limited "in respect of any act or transaction of his in carrying on the business connected with such property." 25 St. 436, § 3. It does not include a demand arising prior to such appointment.

Cognizance of claim.

The principle upon which equity acts in allowing, with respect to certain claims, priority of payment over precedent mortgage in the case of railways is settled by repeated adjudications of the supreme court. The gross income arising from the operation of a railway should be first applied to the payment of the expenses of operation, proper equipment, and needful improvements. If the income be diverted to the payment of bonded interest, in disregard of the payment of such expenses,

Priority of claims over mortgage.

there should be restoration to original equitable right. Failing diversion, there can be no restoration. The amount of restoration is dependent upon the amount of diversion. The power rests upon the fact of diversion of a fund belonging in equity to the general creditors, or some of them. *Fosdick v. Schall*, 99 U. S. 235; *Burnham v. Bowen*, 111 U. S. 776; *S. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 125 U. S. 658, 33 Am. & Eng. R. Cas. 16; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 43 Am. & Eng. R. Cas. 476; *Morgan's L. & T. R. & S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 45 Am. & Eng. R. Cas. 631. The exercise of this equitable power in the court is not, however, dependent solely upon diversion of current earnings to payment of bonded interest, leaving current expenses unpaid, but is exercised as well in consideration of the fact that, in case of failure of trustee to take possession upon default, it is indispensable to the preservation of the property, and its maintenance in integrity, that it should be operated. It must be kept a going concern. The expense of such operation and maintenance within a limited time prior to the receivership is therefore allowed priority. *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 12 Am. & Eng. R. Cas. 464; *Union Trust Co. v. Souther*, 107 U. S. 591, 11 Am. & Eng. R. Cas. 707.

The principle is here sought to be extended to embrace a claim for a death occurring in the operation of the road within the limited period. In an able and ingenious argument the counsel for the petitioner insists that, although the liability for the death here rests upon statute law, and is to a stranger to the contract of hiring, and arises from failure of duty enjoined by the law of master and servant, yet that the liability is imposed by the law upon, and constitutes a term of, the contract of hiring, and so must be regarded as a liability incurred in the operation of the road, having priority of payment over a precedent mortgage. This proposition finds support in the case of *Dow v. Memphis & Little Rock R. Co.*, 20 Fed. Rep. 260, 17 Am. & Eng. R. Cas. 324. There Judge CALDWELL, in appointing a receiver of the railway, provided by his order for the payment of all obligations incurred for injuries to person within the six preceding months. He states that failure by the trustee to take possession works an implied assent that the earnings of the road should be applied to compensate those damages in its operation, and asserts that the rulings of the supreme court furnish ample authority for such order. A careful reading of all decisions of the supreme tribunal upon that subject convinces me that Judge CALDWELL has either

Claim for
death has no
priority.

misconceived the underlying principle of these decisions, or seeks to extend it unduly.

The supreme court, as I read the opinions, has been most careful to limit the doctrine to claims representing that which has inured to the benefit of the mortgaged property, such as labor and supply claims, amounts due to connecting roads for material, repairs, ticket and freight balances, and the like. allowing priority to such claims, because their non-payment would cause cessation of work, supplies, and running arrangements, and result in stoppage in the operation of the road, which, in the interest, as well of the bondholder as of the public, is not to be tolerated. The doctrine is analogous to that of the admiralty allowing certain supplies to a vessel precedence over a mortgage upon the vessel, and rests upon the same principle. The vessel must not be allowed to rot at the wharf. The railway must not be permitted to rust, and its franchise to be forfeited, through failure to operate. Such things, therefore, that are done to avoid such result working destruction to the mortgage should be compensated in priority to the mortgage. The protection accorded is for that done for the benefit of the *res*, not that suffered in the doing, not to individual right under the contract; for that done in performance of the contract, not that suffered by breach of contract; for labor and supplies furnished, not wrong sustained. A death claim does not come within the principle. The loss of life occurred in the operation of the road, but arose from failure of duty. It happened in the performance of the contract, but not because of performance. Its promoting cause was the default of the company, not the labor performed. The resulting death was a detriment, not an aid, to the road. It was in no possible sense of advantage to the mortgage interest. The *res* was not benefited, and that, I take it, is the test. If failure to take possession works an implied assent that the earnings should be applied in compensation of casualties in priority to the mortgage, why not as to all floating indebtedness, to all improvements upon the road, and irrespective of time? Why not say that, through failure to take possession, the bondholders assent that earnings should be devoted to the payment of all debts incurred after default in the payment of interest, and in priority thereto? Why limit such priority to the period of six months prior to the receivership? If priority is to be predicated upon implied assent instead of upon benefit to the *res*, it should be allowed to all claims arising during failure to take possession from which assent is implied. The priority should be co-extensive in point of time with the implied assent. That logically results from the principle bottomed

upon implied assent. Such doctrine is, to my thinking, a broad departure from the equitable doctrine declared by the supreme court, and would be ruinous in its consequences. If conceded, the entire floating debt of a railway company, occurring after default in payment of interest, and during failure to take possession, would necessarily and logically be given priority. Vested rights of property would be subjected to great detriment under such holding. The bonds of American railways are scattered throughout Europe, and are held in many hands. It requires much time to institute concerted action by the holders after default in the payment of interest. Meantime, unprincipled directors, anxious to retain possession of the road, could contract indebtedness—given priority by such ruling—working ruin to the mortgage interest. The bondholder would be “improved out of his estate,” and his vested rights placed at the mercy of hostile directors. I am unwilling to assent to such doctrine. I do not understand it to be the law. The rule is that current income should be first devoted to the current expenses of operation. Liability for death is not an expense of operation in any just sense of the term. It is an unsecured debt, and, as such, cannot take precedence in payment over prior and express liens. *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.*, 125 U. S. 658, 673, 33 Am. & Eng. R. Cas. 16.

The application was presented only upon the theory of priority. The record presents no disclosure touching income. There is no suggestion of its diversion. There has been no sale of the road. It may happen that the income will more than suffice to discharge the operating expenses and the unpaid and accruing interest. There may arise equities sanctioning payment of the claim not possible now to forecast. The petitioner may therefore take order for an issue to determine the question of liability of the company and its amount, subject, with respect to payment, to the ruling herein declared.

Claims for Personal Injuries—Priority over Mortgage.—See *ex parte Brown* (S. Car.), 9 Am. & Eng. R. Cas. 723; *Mobile, etc., R. Co. v. Davis* (Miss.), 26 *Id.* 425; *Central Trust Co. v. East Tenn., etc., R. Co.* (C. C.), 30 *Id.* 450; *Dow v. Memphis & L. R. R. Co.*, 17 *Id.* 324; *Frazier v. East Tenn., Va. & Ga. R. Co.* (Tenn.), 40 *Id.* 358.

CENTRAL TRUST CO. OF NEW YORK

v.

WABASH, ST. LOUIS & PACIFIC R. CO. *et al.* (SWAYNE,
Intervenor.)*(United States Circuit Court, D. Indiana, February 10, 1891, 46
Fed. Rep. 26.)*

Mortgage—Priorities—Rentals of Leased Line.—An insolvent railroad company, on its own petition, procured the appointment of receivers to take possession of its road and lines leased by it. In the same suit, the trustees of a mortgage upon the company's road, asked and were denied an appointment of receivers or an extension of the receivership under their cross-bill. The trustees, however, obtained a decree of foreclosure and a sale of the property thereon. *Held*, that the rentals of the leased lines while in the possession of the receivers did not become a charge upon the *corpus* of the property having priority over the mortgage debt.

Receiver—Appointment at Instance of Mortgagor—Adjustment of Liabilities and Expenses.—The mortgagor or lien holder who procures a receivership of a railroad, thereby consents to the subjection of his interest in the property of which possession is taken at his instance, to the discharge of liabilities and expenses incurred by the receiver under the orders of the court. But where receivers are appointed upon the petition of the insolvent debtor the situation is different, and the administration of the trust and the adjustment of liabilities for past and current expenses must be upon principles different from what would otherwise govern.

IN EQUITY. On exceptions to master's report.

The intervenor, as trustee of mortgages upon what was known as the "Indianapolis, Peru & Chicago Railroad," extending from Indianapolis to Michigan City, claims compensation for the use of that road and its equipment by the receivers herein. The demand is made in the alternative, either for the net earnings of the road while in the possession of the receivers, or for the amount which under the contracts of June 1, 1881, the Wabash Company, if it had remained in control, would have been bound to pay for the use during the same period of time. The net earnings the master has reported at \$261,906.70, the rental under the contracts at \$226,053.65, and, following the decision in *Brown v. Railroad Co.*, 35 Fed. Rep. 444, has recommended that the latter sum be allowed. Numerous objections are made to the report, but the principal question is one of priority of right or of lien upon the property which must be charged with the payment of the claim, if payment should be ordered. There is no fund out of which direct payment can be made, but by the terms of the decree entered at St. Louis on January 6, 1885,

foreclosing the general mortgage upon the Wabash road, by virtue of which decree the road was sold, the court reserved the power to resume possession and to order a resale of the property, if necessary, for the discharge of liabilities or claims entitled to preference over mortgage indebtedness; and the question is whether or not this claim is of that character. By the two contracts of June 1, 1881, one of which was made by the Indianapolis, Peru & Chicago Railroad Company and the other by the Michigan City & Indianapolis Company, the roads composing the Indianapolis, Peru & Chicago road, with appurtenances and equipment, were leased to the Wabash, St. Louis & Pacific Railway Company for the term of forty years. Included in the contract of the Indianapolis, Peru & Chicago Company was that part of the road between Peru and La Porte, owned by the Chicago, Cincinnati & Louisville Company, and of which the Indianapolis, Peru & Chicago Company had possession under a contract dated November 15, 1872, subject to a mortgage for \$1,000,000, executed January 1, 1867, to George T. M. Davis, trustee. The Indianapolis, Peru & Chicago road proper, extending from Indianapolis to Peru, was also subject to a mortgage for \$275,000. In consideration of the execution of these leases, the Wabash Company, besides assuming all liabilities of the lessor companies, executed its negotiable forty-year bonds, bearing six per cent. annual interest, payable semi-annually, to the Indianapolis, Peru & Chicago Company for \$1,350,000, and to the Michigan City & Indianapolis Company for \$325,000; and, to secure the payment of the bonds delivered to it, each of those companies executed a mortgage or trust deed of its road to Abram W. Hendricks and the intervenor, as trustees. In those deeds, and also in the contracts of lease, it was provided that for any default of the Wabash Company, continued for ninety days, to pay interest due upon its bonds, the trustees or lessors might re-enter and repossess the leased roads and rolling stock. The Wabash Company gave no security for the performance of its covenants, or for the payment of principal or interest of its bonds, though its entire tangible property was at the time subject to the general mortgage of June 1, 1880, made to secure an issue of bonds for \$50,000,000, of which issue bonds to the amount of \$17,000,000 had been executed and were outstanding, and the lines of road on the east side of the Mississippi river were also under the mortgages of 1867 and 1879 for large amounts. By an agreement between William Cutting, as executor of the will of Francis P. Cutting, and Solon Humphreys, as president of the Wabash Company, which, though bearing a later date, seems to have been made before the contracts of lease, Cut-

ting undertook to procure the execution of those contracts by the railroad companies, and to cause the capital stock of those companies, excepting the shares necessary to keep the organizations alive, to be deposited with Swayne and Hendricks, trustees, for certain specified uses during the term of the lease, and stipulated that at the end of that term the stock should become the absolute property of the Wabash Company, if meanwhile it had performed its covenants and paid the interest upon its bonds. Under the contracts so made, the Indianapolis, Peru & Chicago road became and continued to be a part of the Wabash system until May 29, 1884, when upon the petition of the Wabash Company, avowing its own insolvency and inability, without the aid of the court, to retain control of leased lines and keep the system intact, the United States circuit court sitting at St. Louis appointed Messrs. Humphreys and Tutt receivers, and put them in possession. Two days later, on June 1st, the company made default in the payment of interest upon its bonded indebtedness, including that of which the intervenor was trustee, and within a few days thereafter the Central Trust Company and James E. Cheney, trustees, filed a cross-bill in the case for the foreclosure of the general mortgage, in which they prayed for the appointment of a receiver in the interests of their trust; but the application, though renewed in October and November of the same year, was in each instance denied. Afterwards the trustees filed original bills for the foreclosure of the general mortgage in the courts of the states in which the different lines of the system were situate, and upon removal of the suits to the United States courts, where a consolidation with the original suit of the Wabash Company was soon ordered, the trustees made application to have receivers appointed, or for an extension of the existing receivership to the general mortgage, and this application was also denied. Pending these proceedings, Wager Swayne and Abram W. Hendricks were parties to the suit, as trustees, and had entered their appearance. Wager Swayne was also counsel for the Wabash, St. Louis & Pacific Railway Company, and presented the bill upon which Messrs. Humphreys and Tutt were appointed receivers. George T. M. Davis, trustee of the Chicago, Cincinnati & Louisville mortgage, was also a party to the suit, and had entered his appearance therein. The consolidated cause for foreclosure of the general mortgage, at St. Louis, went to decree in January, 1886; and the lines of railway composing the Wabash system, excepting such of them as had been surrendered by the receivers to trustees and others by order of the court, were sold to a committee of general mortgage bondholders in April, 1886, which sale

was confirmed, and the receivers were ordered to deliver the property to the purchasers. Before delivery the receivers were removed from the possession of the lines east of the Mississippi river, and another receiver was appointed for those lines by the United States circuit court for the southern district of Illinois, who took possession on January 1, 1887. The lines on the east side of the river were sold afterwards upon a decree rendered in the seventh circuit, foreclosing the mortgages of 1867 and 1879, and were purchased by the same committee which purchased under the decree at St. Louis. This sale was also subject to a reserved power of the court to retake possession, if necessary, to enforce payment of claims or liabilities entitled to preference over the mortgage debts. While the decree foreclosing the general mortgage declared that the lien of that mortgage attached to leased lines "to the extent of the interest of the Wabash Company therein," it excepted the Indianapolis, Peru & Chicago and some other lines from the order of sale. The order of court appointing Humphreys and Tutt receivers, besides directing the payment of rentals and other claims out of the income which should come to their hands, contained the following, viz.: "That such receivers keep such accounts as may be necessary to show the source from which all such income and moneys shall be derived, with reference to the interest of all parties herein, and the expenditures made by them. And on June 28, 1884, the court directed the receivers to keep accounts of all the earnings and income from, as well as of all the operating expenses and cost of maintenance and taxes of, certain named lines or divisions, including the Indianapolis, Peru & Chicago road; "and make quarterly reports thereof, showing not only the income and expenses of each of the lines aforesaid, but also the methods by which the incomes and expenses of the lines were respectively ascertained." Reports were made accordingly, which showed a net income from the Indianapolis, Peru & Chicago lines, while in the hands of the receivers, of \$100,760.70; and, no exceptions having been filed, the reports were confirmed by an order of court entered on the 10th day of October, 1887. On April 16, 1885, an opinion and order was rendered and entered by Circuit Judge BREWER, (23 Fed. Rep. 865,) containing the following: "Subdivisional accounts must be kept separately, * * * in order that the particular equities of each one of these divisions, as between themselves, may be ascertained. When any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus * * * Any net earnings should be paid over to the lessor, or, if there be a subdivisional mortgage, to the mortgagee. There

will be no modification of the order heretofore entered concerning receivers' certificates, but all equities respecting them, as between various subdivisions, will be adjusted in the final decree. * * * When it comes to a sale of the road or other final disposition of the matter, it may be there will be such equities as will justify the casting the burden of these certificates upon one division rather than another."

On the 23d of October, 1885, in obedience to an order of the court made at the instance of the intervenor, the receivers surrendered to him the road in question, and its equipment, except that portion covered by the mortgage to Davis, trustee, which under a like order had been surrendered to him on the preceding 8th of June. The orders of the court, in addition to the surrender of possession by the receivers, authorized Davis and Swayne, as trustees, to prosecute suits in this court for the foreclosure of their respective mortgages, and directed the receivers to appear here, and present for adjudication any demand they had as receivers against the Indianapolis, Peru & Chicago road, or its subdivisions, for operating expenses, or on account of receivers' certificates issued under orders of the court for liabilities antedating the appointment of receivers; and also to appear to, answer, and litigate to final adjudication any claims, by way of set-off or counter claim, against them, growing out of and properly connected with any such claims presented by them as receivers. Accordingly, upon cross bills filed here in the consolidated cause, Swayne and Davis, as trustees, procured decrees foreclosing their respective mortgages, under which the several properties were sold in 1886, and passed into the possession of the Lake Erie & Western Railway Company, which still owns them. The issues joined between the parties, in respect to the matters now in dispute, need not be more particularly stated.

McDonald, Butler & Snow, for intervenor.

Wells H. Blodgett and C. B. & W. V. Stuart, for respondent.

WOODS, J.—If the intervenor's claim has any just foundation, it is in the doctrine of *Fosdick v. Schall*, 99 U. S. 235. That doctrine has been defined and illustrated in a number of later cases, quotations from two of which (St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co., 125 U. S. 668, 33 Am. & Eng. R. Cas. 16, and *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 43 Am. & Eng. R. Cas. 519), will be found to be especially applicable here. In the first case it is said: "It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts

The doctrine
of *Fosdick v.*
Schall.

due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on mortgage bonds. But there is here no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus*; and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence, in the distribution of the proceeds of a sale of the property itself, over the creditors who are secured by prior and express liens. There are cases, it is true, where, owing to special circumstances, an equity arises in favor of certain classes of creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank, in priority of payment, even upon the distribution of the proceeds of a sale of the body of the property, those who are secured by prior liens. The rule governing in all these cases was stated by Chief Justice WAITE in *Burnham v. Bowen*, 111 U. S. 776, 783, as follows: 'That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been improperly applied to their use.' There has been no departure from this rule in any of the cases cited; it has been adhered to and reaffirmed in them all. * * *

It cannot be said that the application of earnings to the payment of the interest on the first mortgage bonds is chargeable to the holders of the second and third mortgage bonds; the latter alone are interested in the fund for distribution. That fund, in the sense of the rule sought to be applied, cannot be said to have been benefited by the payment to other bondholders from the gross earnings applicable to the payment of rent. The equity of the petitioner, if in fact it exists, is against the holders of the first mortgage bonds who have actually received the money to which it claims to be equitably entitled."

In *Kneeland v. American Loan & Trust Co.*, the claims were for the rental of rolling stock, which had been obtained by the railroad company on conditional contracts of purchase, in the form of leases, reserving title in the vendors, with right to retake possession on default in the payment of certain annual sums called "rent." The first application for a receiver was made August 1, 1883, by a judgment creditor. The trustees in the mortgages upon the road were made parties to the bill, and entered their appearance, neither objecting nor consenting, and a receiver was appointed, who continued in possession until the ensuing December 1st, when, upon bills brought by those trustees, the court appointed another

receiver and, in accordance with the prayer of the bill, put him in possession both of the road and the rolling stock. The claims presented were for rentals during both receiverships, and, there being no other resource, payment was asked out of the proceeds of sale, to the exclusion *pro tanto* of the mortgage debts. The court, among other things, said: "Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few special and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. * * * One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, had been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be presumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. * * * So that these intervenors acquired no right of priority by virtue of their antecedent contracts of sale. But it is argued, and with force, that the court did not allow contract price, but only rental; and the question is asked, may a court, through its receiver, take possession of property, and pay no rental for it? If it may legitimately compel the operation of a railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations; and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of; and this, irrespective of the question who may be the ultimate owner, or

who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under obligations to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself. * * * The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession, through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court, responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court in chancery to take possession, not only of the real, but also of personal property, and for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien; but it certainly is a consent that the rental value of that personalty, during the time of the possession by the receiver, appointed at his instance, may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. * * * The conclusion is irresistible that, under the circumstances, reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness.

Upon these considerations the decrees of this court in which the cases originated were reversed, "with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagors, and to allow the rentals as fixed for the time subsequent thereto."

No suggestion to the contrary having been made at the hearing, I shall assume that the contracts of June 1, 1881, were valid, though, under the decision in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 24 Am. & Eng. R. Cas. 58, it would seem clear that they were *ultra vires* and void: and, if so, the petitioner, without regard to the objections that were urged against his right to intervene, has no standing in court. The

Validity of
contracts of
payment.

mortgages of which he is trustee are void if the contracts are. It would follow, further, from the illegality of the contracts, that, if the receivers are liable for the use of the Indianapolis, Peru & Chicago lines of road, it is not for the price stipulated in the contracts with the Wabash Company, but for the reasonable value of the use, as if no special agreements had been made or attempted; and, indeed, upon the facts of the case, I am convinced that this would be so, even upon the assumption that the contracts, as between the parties, were valid and determinative of their rights. It is true that in *Brown v. Toledo, P. & W. R. Co.*, 35 Fed. Rep. 444, it was held that these receivers, by taking possession of a leased line under the order of the court, "became assignees of the lease, and, as such, liable for the rent;" but a rehearing has been granted in that case, since the report of the master in this was filed, and, while the doctrine of it is, perhaps, the established rule of cases which involve only private rights, the reported decisions show that it has seldom, if ever, been deemed applicable to receivers of railroads who had taken possession of leased roads, or of leased rolling stock found in use upon, or in connection with, the main or trunk lines over which they were appointed; for the reason, I suppose, that the taking of possession of the leased property, ordinarily, is not a purely voluntary act, amounting to an election, on the part either of the receiver or of the court appointing him, but is compelled by that public policy which requires a railroad of established use to be kept in operation. Indeed, it is sometimes a physical necessity. In this case, for instance, an immediate separation of the leased lines from the Wabash roads proper, and from each other, for the purpose of surrendering any of them, with its rolling stock, to its owner, was manifestly impracticable; even if it appeared, as it does not, that the owner was ready and willing to resume possession, and to discharge the duty to the public of keeping the road in operation.

For what
amount re-
ceiver would
be liable.

Besides, the laborers who were or had been employed by the Wabash Company, whether upon profitable or unprofitable lines, and, likewise, those who had furnished supplies, had a right to look for their pay to the revenues of the entire system, and not alone to the earnings of the particular subdivision to the operation of which they had contributed. Giving credit, as in the nature of things they must have done, to the company for the time being in charge, they were not required to know the relations to each other of the different branches composing the system, nor bound to inquire into the contracts, whether of consolidation or of lease, by which the combination was effected.

Rights of
laborers em-
ployed by
Wabash Co.

It is to be observed, too, that the leasehold of the Indianapolis, Peru & Chicago lines was a valuable part of the assets of the Wabash Company, which the receivers, by virtue of their appointment upon the petition of that company, were necessarily bound to take into possession and preserve, equally with other assets, for disposition according to the rights of claimants, as they should be finally established. The first default in the payment of interest due to the bondholders represented by the intervenor occurred June 1, 1884, just after the appointment of receivers. The intervenor, as trustee, had no right to possession, except upon a default continued for ninety days; so that until the ensuing August 30th the right of the receivers to hold possession and to receive the earnings in dispute was absolute, and until after that date it was not in the rightful power of the court, without the consent of parties interested, to have ordered a surrender of possession. If the application for the appointment of receivers had been by a mortgagee of the Wabash Company instead of the company itself, the applicant might have so framed his bill as to escape responsibility, on the theory of consent, for any action of the court or its receivers in respect to leased roads. In this respect the opinion in *Kneeland v. American Loan & Trust Co.*, is quite as explicit as in the recognition of the doctrine, in which the cases following *Fosdick v. Schall* agree, that the mortgagee or lienholder, who procures a receivership, thereby consents to the subjection of his interest in the property, of which possession is taken at his instance, to the discharge of liabilities and expenses incurred by the receiver under the proper orders of the court. When, therefore, as in this case, receivers are appointed upon the petition of an insolvent debtor, and there is behind the court no responsible party who has an interest in the property which may be applied to the payment of court debts and expenses, the situation is essentially different, and the administration of the trust and the adjustment of liabilities for past and current expenses, it would seem, must be upon principles somewhat different from what should otherwise govern. It is certainly not true in this case, as counsel for the intervenor have strenuously insisted "that the court took possession of the leased lines for the benefit of the Wabash Company and its mortgagees and creditors, and not for the benefit of the lessor companies and their mortgagees." On the contrary, under the contracts of lease, the lessor companies and their mortgagees were themselves creditors of the Wabash Company, and the action of the court in appointing receivers, upon the motion of that company, was neces-

Possession of
leasehold by
receiver.

Effect of
mortgagee ap-
plying for re-
ceiver.

sarily, in law and in equity, as much for their benefit as for the benefit of any other mortgagee or creditor. And it follows that the rights of all the parties must be determined and enforced with due reference to the respective contracts and mortgages under which they claim, or out of which their rights have arisen.

The general mortgage executed by the Wabash Company, on June 1, 1880, to the Central Trust Company and Cheney, as trustees, contained an "after-acquired property" clause, by force of which it covered the interest of the Wabash Company in the Indianapolis, Peru & Chicago lines, acquired under the contracts of June 1, 1881; and according to *Dow v. Memphis & L.*

Rights of
trustees in
filing cross
bill.

R. R. Co., 124 U. S. 652, 33 Am. & Eng. R. Cas. 12, and other cases, if the Wabash system, as a whole, had been earning more than the expenses of operation, when the trustees of that mortgage filed their cross-bill and asked the appointment of receivers in the interest of their trust, they would have become entitled thereafter to that surplus, even though derived, in whole or in part, from these leased lines, unless, before it had accrued, the intervenor, by a re-entry or by demanding possession for condition broken, had established his right thereto for the use of his *cestuis que trust*; but, there having been a deficit instead of the supposed surplus, the trustees of the general mortgage, by filing their cross bill, acquired no interest in the earnings either of the entire system or of any subdivision; and the excess of the earnings of the Indianapolis division, so long as it remained a rightful part of the system, belonged necessarily to the receivers, to be applied to current operating expenses of the system, and, under the orders of the court, to the payment of preferential liabilities which had accrued before the receivers were appointed. Until August 30, 1884, that was under the contracts unconditionally so. After that time, by demanding possession, the intervenor might have terminated the right of the receivers in this respect, and have established his own; but without such demand, or some equivalent fact, it would seem clear that he had no claim upon the earnings, though embraced by express terms in his mortgages. *Sage v. Memphis & L. R. R. Co.*, 125 U. S. 361, 35 Am. & Eng. R. Cas. 40, and cases cited.

It is insisted, however, that by certain orders of the court, and especially by that of April 16, 1885, the court gave assurance that, "when any subdivision earned a surplus over expenses, the rental or subdivisional interest would be paid to the extent of the surplus;" and that by reason of this the intervenor was under no necessity of making a demand for possession in order to estab-

Effect of prior
orders of the
court.

lish the right which he now asserts. But, if this were conceded, it would still be apparent that he acquired no interest in the earnings which accrued before that order was made, and that on this account alone there would have to be a large reduction in the master's computation of the amount due. The order of the court, however, will not bear the construction insisted upon. It contains, besides the quotation given, the further clause: "There will be no modification of the order heretofore entered concerning receiver's certificates, but all equities respecting them, as between various subdivisions, will be adjusted in the final decree," etc.; and upon the entire record it is evident that the court did not intend an unconditional promise or assurance that the surplus earnings of a subdivision or leased line should, in any and all events, be paid as rental or interest to the owners or mortgagees thereof. On this point it is enough to refer to the decision of Justice BREWER while upon the circuit bench, as reported in *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 38 Fed. Rep. 63, where the question was substantially the same as here. The intervenor never obtained a specific order of the court for the payment to him, or upon the mortgage debts which he represented, the net earnings of the Indianapolis, Peru & Chicago lines, though the quarterly reports of the receivers all the while showed receipts from that source sufficient for the purpose, which in his relations to the case he must have known were being expended in the operation of the system, or in the payment of preferential debts antedating the receivership, and that, if ever refunded, it would have to be done out of the *corpus* of the Wabash property at the expense of its mortgagees. It may be remarked in this connection that, when the intervenor came to present his claim to this court for adjudication, neither in his original nor supplemental petition did he assert or suggest that his demand rested upon the orders of the court, in the sense now urged, or had any better equity on that account.

If, upon the filing of their cross bill, the court had granted the motion of the trustees of the general mortgage for the appointment of receivers in their interest, or had sustained any of the like motions which they afterwards made, they would have become responsible, I suppose, for the conduct of the receivership from that time, as if the appointment had been made upon their motion in the first instance, and so, perhaps, the interests represented by them might have been subordinated to the intervenor's claim thereafter accruing; but, the court having denied all their efforts to obtain charge of the receivership, it cannot be said that any order of the court rests upon their implied consent; and if the bonds se-

cured by the general mortgage, or by the mortgages of 1867 and 1879, can be postponed in favor of the intervenor's demand, it must be because that demand is somehow to be deemed one of the "obligations" which in *Kneeland v. American Loan & Trust Co.*, *supra*, are said to be "burdens necessarily upon the property taken possession of," "irrespective of the question who may be the ultimate owner," "or who may have the preferred lien, or who may invoke the receivership."

Reference has been made to *Miltenberger v. Logansport R. Co.*, 106 U. S. 286, 12 Am. & Eng. R. Cas. 464, and it appears that in that case the rental for the use of a leased line of road by the receivers therein appointed was ordered paid out of the proceeds of sale in preference to mortgage debts. But the original lease in that case was for a short term, with rights of extension or abandonment upon short notice, and it is fairly inferable that the successive receivers were deemed to have continued in possession of the leased line with the consent of the mortgagees whose rights were postponed. When, however, as in this case, the lease is for a long term, the practical result is an incorporation of the leased line into the body and ownership of the principal line, and in no just sense is the value of the use of one, more than of the other, an operating expense of the combination. If so, a mortgage upon a railroad, instead of having stable value according to the fixed principles of law and equity applicable to mortgages upon real estate, is subject to displacement at the will of the mortgagor, as well for his own interest as for the benefit of other parties to contracts of subsequent date, which, upon principles hitherto supposed to be established, should be subject to existing and recorded mortgage liens. The Wabash Company, by making the contracts of June 1, 1881, certainly neither conferred nor acquired any rights which, in respect to the mortgaged properties, were not subject to the mortgages theretofore made; and the court, by appointing receivers at the instance of that company, did not as I conceive, acquire power to change the order of priority in that respect. In fact, while those contracts are in the form, and, when considered by themselves, may be entitled to the name, of leases, the Cutting contract shows that the real purpose of the transaction was a sale of the Indianapolis, Peru & Chicago roads to the Wabash Company for the price evidenced by the bonds which that company delivered to the so-called lessors. The interest on those bonds may have been regarded by the parties as equivalent to a fair annual rental of the leased road and equipment until at the end of the term the

Rental of
leased line
not entitled
to priority.

intended sale should be consummated, but, even if so treated, it was not, under the circumstances, I think, an operating expense of such character as to be entitled to equitable preference over the mortgage liens of prior date.

Counsel for the intervenor, referring to the decision upon the intervening petition of Gilman and others, in *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 259, say: "It is difficult to understand how the court could bring itself to believe that either law or equity would sanction the taking by the court of the net earnings of leased lines, held by the court for the benefit of the Wabash Company and its bondholders and creditors, and apply them to the payment of either past or current operating expenses of the lines of railway owned by the Wabash Company, leaving the rent of the leased lines making such net earnings unpaid."

The strength of this statement is largely in the erroneous assumption, already pointed out, that the receivership was for the special benefit of bondholders and creditors of the Wabash Company, as distinguished from the mortgagees and creditors of the lessor companies. There is in the statement the further implication, necessary to the force of the argument, that there has been an improper diversion of earnings "to the payment of either past or current operating expenses of the lines of railway owned by the Wabash Company," which ought to be made good at the expense of the mortgagees of that company,—a proposition which, I believe, embraces error both of law and of fact; of fact, because the master's report does not show, nor has the evidence been pointed out which shows, that the excess of expenses of operation over earnings of the entire system arose "upon lines of railway owned by the Wabash Company," and not, in whole or in part, upon leased lines, nor that the net earnings of the Indianapolis, Peru & Chicago lines were expended for any particular purpose, or in such way as to be traceable. The argument at the hearing, as it was understood, proceeded on the assumption or concession that those earnings were mingled with the general income of the system, and were expended in the payment of current expenses or in the discharge of preferred liabilities, which had accrued to a large amount before the receivers were appointed; the report showing that upon that class of liabilities the receivers had paid as much as \$4,416,797.13, and that under the orders of the court, at St. Louis, they had "disbursed all the funds which came to their hands as such receivers; and, other than in this general way, it was not claimed nor shown that the earnings in question were applied to the benefit of the mortgagees of the Wabash Company; and, this being so, there has

been no diversion which, according to *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, *supra*, the mortgagees can be required to make good. But for the authoritative statement in that case to the contrary, I should have been of opinion that payments upon a first mortgage are a benefit to the holders of subsequent mortgages or liens so direct and certain as to constitute a diversion, if made out of earnings, which a court of chancery would charge upon the property, or upon the proceeds of a sale upon foreclosure of the second or later mortgage,—the fund produced being presumably larger by the amount of the payments upon the prior lien; but, since that is not so, much clearer is it that there has been no diversion of the earnings in question here which can be charged upon the Wabash roads in preference to the rights of the mortgagees; and if the intervenor, or those on whose behalf, he sues, would recover the money, they must seek it of those who received it. If those earnings had been stolen or otherwise lost, or if, through mismanagement of the receivers, they had not accrued, the mortgagees would not be chargeable; and so it must be in respect to any misapplication thereof not made at their instance, or for their benefit, within the meaning of the rule declared by the supreme court.

In this connection it is proper to refer to the proposition of counsel "that the Wabash Company did not owe any debts for operating expenses incurred by the company within six months next prior to the date of the appointment of Humphreys and Tutt as receivers, simply because the Wabash, St. Louis & Pacific Railway Company, did not operate any railway during that six months, or any part of it; the St. Louis, Iron Mountain & Southern Railway Company—a perfectly solvent corporation—having possessed and operated the entire Wabash Railway and its leased lines during that six months under the lease made to it by the Wabash Company on April 10, 1883." If the fact were as stated, and the inference justified that the court committed a great wrong or error in recognizing the debts of that period as debts of the Wabash Company, entitled to payment out of the earnings of the system under the receivers, it is clear that the wrong cannot be righted at the expense of the mortgage creditors. To do so would be only to add to the original injustice done them, upon this theory, by the issue of receivers' certificates for a large part of those debts, and making the certificates a prior charge upon the mortgaged property. The fact, however, is that by the lease referred to the Iron Mountain Company took possession of the Wabash system, under an agreement to operate it, to receive its income and earnings, and apply them, after paying operating expenses, upon the obli-

gations of the Wabash Company, but became itself in no way personally bound to pay or contribute to those expenses. On the contrary, the Wabash Company bound itself, and afterwards executed a mortgage to secure the obligation, to repay to the Iron Mountain Company any sums which it should expend for the benefit of the Wabash Company under the lease. The debts, therefore, which accrued, during that arrangement, on account of operating expenses, were the debts of the Wabash Company, and were properly treated as entitled to payment out of earnings or income in the hands of the receivers. Whether the receivers' certificates, if issued without the consent of the mortgagees, were a proper charge upon the *corpus* of the property payable before the mortgages thereon is quite a different question, but, in view of the opinion and rulings in *Kneeland v. American Loan & Trust Co.*, *supra*, as well as upon principle, it is a question which it would seem should be resolved in the negative. The rental of cars is not less distinctly an operating expense than the rental of leased lines of road, certainly, and yet in that case the claim for the use of rolling stock, during the four months next preceding the appointment of receivers upon motion of the mortgagees, was rejected; and like claims which accrued after that appointment were allowed, only because the mortgagees in their bill had asked the court "to take possession, through its receivers, of both the real and personal property." If, however, such rentals, accruing during a receivership, were "burdens necessarily upon the property taken possession of, * * * irrespective of the question who invoked the receivership," the claims ought, on that ground, to have been paid for the whole time, including the receivership obtained by the judgment creditor, as well as that of the mortgagees; the consent, express or implied, of the mortgagees being on that theory immaterial. The claims which accrued under the first receivership were, of course, not less meritorious because the road was in the custody of the court than if the railroad company had been in charge; and, under what in this circuit is called the "six-months rule," they would certainly have been entitled to payment if there had been in the hands of the receivers a fund derived from earnings of the road; and the court's refusal to sanction the payment thereof out of the proceeds of sale of the property on decree of foreclosure would seem to mean necessarily that, without the consent of mortgagees, the rental of rolling stock, though used by receivers under the sanction of the court, cannot be paid in preference to prior mortgage debts. It will not do to say, as was suggested in argument, that this decision rests in any degree on the ground that the owners of rolling stock had

retained a lien upon the property, and that, having that security, they were not entitled to ask relief on other equitable grounds. If there were force in the suggestion, it would be of equal potency in the present case, where the lessors took a like security upon the leased property, whereby, upon any default of the lessee, their trustees were authorized to resume possession. In neither case, however, can it be said that the claim presented was a secured claim. The contracts under which the railroad company obtained possession of the rolling stock were not treated as binding upon the parties; the rentals were estimated upon the basis of fair value, as if no contracts had been made; and in no proper sense can be said to have been secured by the reserved right of the vendors to resume possession. That right could not have been exercised against the receivers, without leave of court. The same is true in respect to the intervenor's rights as trustee. His power to take possession might have been employed, under the sanction of the court, to stop further use by the receivers of the roads in which he was interested, but it constituted no sort of security for the payment of rentals already accrued. The conclusion reached that the claim presented ought not to be made a charge upon the interests of the mortgagees or of the purchasers at the foreclosure sales, the consideration of other questions is not necessary. It follows that the master's report should be set aside, and the intervenor's petition dismissed.

Railroad Mortgage—Priority of Liens for Materials for Original Construction.—In *American Loan & Trust Co. v. East & West R. Co. of Alabama, et al* (Jersey City Iron Co., Intervenor) 46 Fed. Rep. 101, it was held by the United States Circuit Court for the Northern District of Alabama, that a debt created for materials for original construction of a portion of a railroad more than six months before the appointment of a receiver in proceedings for the foreclosure of a mortgage is not within the rule authorizing the court to provide for arrears due for operating expenses of the road out of the net income of the property, and in the absence of a showing that there had been a diversion of current funds or income which should have been applied to the payment of the claim for such materials, will not be given a priority over the rights of the mortgage creditors. PARDEE, J., said: "Counsel for intervenor seems to rely mainly upon the case of *Fosdick v. Schall*, 99 U. S. 235, and the line of cases thereafter following, as holding that 'debts contracted by a railroad corporation as a necessary part of the operating expenses, or for labor and supplies, or for necessary equipments or improvements of the mortgaged property, are privileged debts, entitled to be paid out of the current income if a mortgage trustee takes possession, or if a receiver is appointed in a foreclosure suit.' In *Hale v. Frost*, *Id.* 389, it is held that the net earnings of the railroad while in possession of the court and operated by its receiver are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in payment of claims which have superior equities, if such shall be found to exist. The court, in applying this rule in that case, only allowed for the payment of supplies to the machinery depart-

ment, furnished before the appointment of a receiver, and rejected that part of the account which was for material for construction purposes, as not based on any special equity. *Miltenberger v. Logansport R. Co.*, 106 U. S. 287, 12 Am. & Eng. R. Cas. 464, decides: 'A court has the power to create claims through a receiver in a suit for the foreclosure of a railroad mortgage which shall take precedence of the lien of the mortgage. It may, therefore, provide that the receiver shall pay the arrears due for operating expenses for a period in the past not exceeding ninety days, and pay indebtedness not exceeding \$10,000, to other connecting lines for materials and repairs and for ticket and freight balances, a part of which had been incurred more than ninety days before the order appointing him was made, and purchase rolling stock, and build six miles of road and a bridge, part of the main line of the road, and making such expenditures a lien prior to the lien of the mortgages.' But it must be noticed that the original construction dealt with was subsequent to the receivership. In *Union Trust Co. v. Souther*, 107 U. S. 591, 11 Am. & Eng. R. Cas. 707, the court, so far as it allowed for the payment of permanent improvements and original construction, dealt entirely with debts contracted by the receiver and during the receivership under the authority of the court. *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434, 25 Am. & Eng. R. Cas. 560, is to the same effect. The case of *Burnham v. Bowen*, 111 U. S. 776, was a case in which the court was dealing with diversion of income for the improvement of the property by the trustees in possession, or by a receiver, and holds in such cases that the debts for operating expenses should be paid, if necessary, out of the *corpus* of the property; and in that case the court was careful to declare that 'neither in *Fosdick v. Schall*, or *Huidekoper v. Hinkley Locomotive Works*, 99 U. S. 258, did they decide that the income of a railroad in the hands of a receiver for the benefit of mortgage creditors who had a lien under their mortgage can be taken away from them and used to pay the general creditors of the railroad.' Finally, in the case of *Wood v. Guarantee Trust & S. D. Co.*, 128 U. S. 421, the supreme court expressly declares that the 'doctrine of *Fosdick v. Schall*, is applicable wholly to debts incurred for operating expenses, and does not apply where it is a question of original construction; and, further, that it only applies where there is a diversion of the income of a going concern from the parties to which that income is equitably and primarily devoted.' It does not appear from the record in this case, nor otherwise, that prior to the receivership there was any diversion of current earnings or funds which should have been applied to the payment of intervenor's claim, to the payment of interest on the bonded debt, or any diversion whatever of any earnings of the property which should have been applied to the payment of intervenor's claim. The debt is conceded to be one for original construction. The intervenor can take nothing under the doctrine of *Fosdick v. Schall*. In the order appointing a receiver in the main case no reservation whatever was made for any creditors of the railroad company, except for wages and running expenses incurred by said company in operating said railroad within three months next preceding the date of the order. It is probable that, following the case of *Hale v. Frost*, *supra*, the court could now order application of net income to payment of intervenor's claim if the court could now find that in equity such claim was superior to claims of complainants and others. In the case of *Easton v. Houston & T. C. R. Co.*, 38 Fed. Rep. 12, 39 Am. & Eng. R. Cas. 588, which was a case where it was sought to charge the income arising during a foreclosure suit, and while the property was operated by a receiver, with the payment of a liability incurred by the railway company prior to the receivership on a contract for the carriage of goods, the circuit judge now presiding, in discussing the case, said: 'In all the cases that I have exam-

ined, where debts arising before the receivership have been allowed as prior in equity to the claim of the bondholder on the earnings of the receivership, the underlying principle is that the debt when incurred operated in a direct way to the advantage of the mortgage holders; and, citing this, counsel for intervenor has laid great stress on the admitted fact that the frogs and switches furnished by intervenor were not only used in the construction of the railroad, but were necessary for such construction, claiming thus a clear case where the debt incurred operated in a direct way to the advantage of the mortgage holders. In the dictum quoted the judge could not have intended to declare as a rule that all debts incurred by a railroad company prior to foreclosure of mortgage bonds, which operated in a direct way to the advantage of the mortgage holders, should be allowed as prior in equity to the claim of such mortgage holders on the earnings of the railroad during the receivership. Such a rule would be too broad to be sustained by the adjudged cases. It would practically give an equitable lien for all debts incurred in the construction of railroads, for in every case it would be easy to show that the debt operated in a direct way to the benefit of the mortgaged property, and therefore to the benefit of the mortgage holders. The generally recognized rule is that original construction creditors have no superior equity, and there is no reason why an exception should be made in favor of intervenor who sold material for general construction relying on the credit of the railroad company, and this more than six months prior to any receivership."

Priority of Mechanic's lien Claimant—Removal of Cause—Separable Controversy.—To an action against a railroad company by one asserting an indebtedness claimed to be a first lien on the defendant's track, a mechanic's lien claimant and the mortgagee of the company were made parties. The mechanic's lien claimant filed a cross-petition, asserting his lien, to which the mortgagee was made a party. The mortgagee, in his petition for removal, claimed that his lien was prior to each of the lien claimants, and that the mechanic's lien claimant was estopped to assert a lien superior to that of the mortgage. *Held*, that the controversy presented was simply the question of priority of liens, and that the petition failed to show a separable controversy between the mortgagee and either of the lien claimants, which could be determined without the presence of the railroad company. *Bissell v. Canada & St. L. R. Co.*, 39 Fed. Rep., 225.

KNEELAND

v.

LAWRENCE *et al.*

(140 United States, 209.)

Railroad Bonds—Bona Fide Purchaser—Freedom from Equities.—Coupon bonds of a railroad company payable to bearer pass by delivery; and a *bona fide* purchaser of them before maturity takes them freed from any equities that may have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase.

Same—Purchaser of Bonds as Bona Fide Holder—Decree of Foreclosure.—A railroad company before its consolidation with another company issued 200 first mortgage bonds. Subsequently, the consolidated company issued its bonds and set apart 200 of them to be exchanged for the 200 bonds issued by one of the original companies. The holders of only 130 of these bonds agreed to exchange and did so exchange them. Default having been made in the payment of interest on the new bonds, the mort-

gage was foreclosed, and the decree made the outstanding 70 of the first bonds a first lien on the road or the proceeds of the sale. After the foreclosure 6 of the bonds first issued, purchased from the financial agent of the consolidated company, were presented for payment, which was refused by the purchaser of the road, on the ground that they were a part of the 130 bonds exchanged, and were therefore, fully paid and satisfied. *Held*, that there being nothing to show that these six bonds were not a part of the 70 outstanding, or that the owner was not a *bona fide* holder, they are entitled to be paid out of the proceeds of the sale.

APPEAL from the Circuit Court of the United States for the District of Indiana.

John M. Butler, for appellant.

George T. Porter, for appellees.

LAMAR, J.—This case is one of a large number involving litigation growing out of the foreclosure of a mortgage upon the Toledo, Cincinnati & St. Louis Railroad of Ohio, Indiana, and Illinois. The facts necessary to an understanding of the question at issue, briefly stated, are as follows: The Frankfort & Kokomo Railroad was a road of about 25 miles in length, running from Frankfort to Kokomo, Ind. On the 1st of January, 1879, the company owning the road issued 200 bonds of \$1,000 each, bearing 7 per cent. interest, payable semi-annually, and due in 30 years, and, to secure the payment thereof, executed a mortgage upon its property to the Farmers' Loan & Trust Company. Subsequently, by consolidation, that road became a part of the road of the Toledo, Cincinnati & St. Louis Railroad Company of Indiana and Illinois. On the 23d of July, 1881, the latter company issued 3,000 bonds of \$1,000 each, bearing 6 per cent. semi-annual interest, and due July 1, 1921, and, to secure their payment, executed to the Central Trust Company of New York and Thomas A. Hendricks a mortgage on that portion of its road running from Kokomo, Ind., to East St. Louis, Ill. Two hundred of these bonds were set aside to trustees, to be exchanged at par value for the original Frankfort & Kokomo bonds. One hundred and thirty of those bonds were so exchanged, the holders of the other 70 of them refusing to make the exchange. Default having been made in the payment of interest upon the new bonds, the mortgage was foreclosed, the foreclosure decree being entered November 12, 1885. By this decree it was found that 70 of the Frankfort & Kokomo bonds were outstanding, and that there was due thereon the sum of \$85,108.12; and it was decreed that that sum should be paid out of the proceeds of the foreclosure sale next after the payment of the court costs and master's fees. The foreclosure sale took place December 30, 1885, and the appellant herein, Sylvester H. Kneeland, became the purchaser of the entire line of road from Kokomo to East St. Louis. The sale

was confirmed on the 5th of February, 1886, and on the 10th of March following a deed was executed and delivered to the purchaser. Under an order of court of December 30, 1885, it was provided that all claims which should be filed in court against the railway, or the fund arising from the sale thereof, should be referred to W. P. Fishback, a master of the court. On the 23d of July, 1886, the master reported that the appellees herein, Lawrence Bros. & Co., had produced six Frankfort & Kokomo bonds, (numbers given,) with coupons attached; that said bonds were owned by S. Newton Smith, but were held by Lawrence Bros. & Co. as collateral security for advances made by them to Smith; and that there was due on said bonds the sum of \$8,883.16, to which should be added \$1.26 per day from July 22, 1886, until they should be paid. Exceptions were filed to the master's report by the appellant, but they were overruled, the report was confirmed, and a decree was rendered in accordance therewith. An appeal from that decree brings the case here.

The ground upon which payment of these bonds was resitised, and, therefore, the ground upon which this appeal is based, is that they are not part of the 70 bonds that were not exchanged for Toledo, Cincinnati & St. Louis bonds, but are part of the 130 bonds that were so exchanged, and have been, therefore, fully paid and satisfied. The evidence before the master, and which is set out in this record, shows that the appellees, as brokers, purchased these six bonds for Smith from George William Ballou & Co. Ballou & Co. had obtained possession of three of the bonds from Edward LeConte, giving him in exchange three Toledo, Cincinnati & St. Louis bonds, two income bonds,—one of \$1,000, and the other of \$500,—and thirty shares of stock in the Toledo, Cincinnati & St. Louis road. Where they obtained the other three the record does not show. The argument for the appellant is that Ballou & Co. were the financial agents of the Toledo, Cincinnati & St. Louis road, and that, therefore, it must be presumed that the Frankfort & Kokomo bonds held by them were a portion of the 130 bonds that had been exchanged for a like number of Toledo, Cincinnati & St. Louis bonds, and were, therefore, fully paid and satisfied.

We cannot assent to this proposition. The record shows that the Central Trust Company of New York and Thomas A. Hendricks were the agents of the Toledo, Cincinnati & St. Louis road for the exchange of 200 of its bonds for the Frankfort & Kokomo bonds; and nowhere in the record is there any intimation that Ballou & Co. had any connection whatever with such agency.

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Grounds for
resisting pay-
ment.

Owner of
bonds a bona
fide holder.

Admitting, as is claimed by the appellant, that Ballou & Co. were the financial agents of the Toledo, Cincinnati & St. Louis Company, it does not follow by any means that they might not have been in the *bona fide* possession of a portion, or even all, of the 70 unexchanged Frankfort & Kokomo bonds. There was certainly nothing to prevent Ballou & Co. from purchasing all of those 70 bonds from the holders of them and disposing of them as they saw fit. The 3 bonds which they obtained from LeConte cannot be considered as having been exchanged for a like number of Toledo, Cincinnati & St. Louis bonds at par value, for they not only gave LeConte a like number of bonds, but, as an inducement to such transfer, gave him, in addition, 2 income bonds amounting to \$1,500, and 30 shares of stock. Such a transaction is more in the nature of a negotiation and sale than an exchange, as contemplated by the original arrangement for an exchange of bonds. In fact, there is nothing whatever to show, or even to indicate, that these 6 bonds were not part of the 70 bonds that were not exchanged, but were given a priority of lien by the foreclosure decree. On the contrary, the best of reasons exist for holding that they were not part of the 130 bonds; for, according to the statement of counsel for appellant, (which is borne out by the record in *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 43 Am. & Eng. R. Cas. 519,) those 130 bonds were taken up and canceled, whereas these 6 bonds do not appear to have ever been canceled. They must have been, therefore, a part of the 70 bonds. The evidence shows clearly that Smith was a *bona fide* purchaser of them, and it does not show that the appellees are not *bona fide* holders of them. Coupon bonds like those in suit, payable to bearer, pass by delivery; and a *bona fide* purchaser of them before maturity takes them freed from any equities that might have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase. *Murray v. Lardner*, 2 Wall. 110, 121, and cases there cited. Tested by this rule, the appellant's case must fail. As already stated, there is nothing to show that these 6 bonds are not part of the 70 unexchanged Frankfort & Kokomo bonds, and nothing to show any *mala fides* on the part of Smith and the appellees in obtaining possession of them. Decree affirmed.

BRADLEY, J., was not present at the argument, and took no part in the decision of this case.

Bona Fide Purchaser of Negotiable Bonds Before Maturity Acquires Title.—*Wylie v. Missouri Pac. R. Co.*, 43 Am. & Eng. R. Cas. 431; *McMurray v. Moran* (U. S.), 43 *Id.* 442; *County of Clay v. Society* (U. S.), 5 *Id.* 170; *Ogden v. Daviess* (U. S.), 5 *Id.* 145; *McLane v. Placerville, etc.*, R. Co. (Col.), 26 *Id.* 104; *Duncomb v. New York, etc.*, R. Co. (N. Y.), 4 *Id.* 293; *Brown v. State* (Md.), 24 *Id.* 102; *Feld v. Bank of Mobile* (Ala.), 14 *Id.*

554, note 566; *Indiana, etc., R. Co. v. Sprague* (U. S.), 2 *Id.* 532; *Stewart v. Lansing* (U. S.), 7 *Id.* 225; *Maas v. Missouri, etc., R. Co.* (N. Y.), 3 *Id.* 30.

It is said by the Court of Appeals of New York in the case of *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, that "it is undoubtedly the general rule that the bonds of railroad, manufacturing, municipal and other like corporations, payable to bearer, issued for the purpose of securing loans of money, are in this country deemed negotiable, and coupons thereto attached partake of the same character. 1 *Ror. R. R.* 250; *Evertson v. National Bank*, 66 N. Y. 14; *Thompson v. Lee Co.*, 3 *Wall.* (U. S.), 327; *Com'rs of Knox Co. v. Aspinwall*, 21 *How.* (U. S.), 539. But when such instruments contain special stipulations, and their payment is subject to contingencies not within the control of their holders, they are, by established rules, deprived of the character of negotiable instruments, and become exposed to any defense existing thereto as though still held by the original parties to the instrument. It is essential by such rules that such paper should provide for the unconditional payment to a person, or order, or bearer, of a certain sum of money at a time capable of exact ascertainment. 3 *Rev. St.* (7th Ed.), 2243; 1 *Daniel Neg. Inst.* §§ 27-104; *Evertson v. National Bank*, 66 N. Y. 14; *Frank v. Wessels*, 64 N. Y. 155; *Dinsmore v. Duncan*, 57 N. Y. 580. It would seem, therefore, if these coupons were subject to the condition that the time of their payment could be changed, altered, and postponed from time to time at the option of a majority of the holders of the series of bonds simultaneously issued therewith, it would deprive them of one of the essential characteristics of negotiable paper. It was held in *McClure v. Township of Oxford*, 94 U. S. 429, in an action upon coupons detached from the bonds of a municipal corporation, which were substantially similar in form to the coupons under consideration, that the bonds 'carried upon their face unmistakable evidence that the forms of law under which they purported to have been issued had not been complied with. * * * This suit was brought upon coupons detached from the bonds purchased by the plaintiff in error before maturity, but upon their face they refer to the bonds, and purport to be for the semi-annual interest accruing thereon. This puts the purchaser upon inquiry for the bonds, and charges him with notice of all they contain.'"

Participant in Fraud Rendering Bonds Invalid not a Bona Fide Holder.—In *Smith v. Florida Cent. & W. R. Co.*, decided by the United States Circuit Court for the Northern District of Florida, 43 *Fed. Rep.* 731, it was held that in a suit to enforce the collection of railroad bonds which had been declared fraudulent it appeared that the bonds were given to a firm of which plaintiff was a member in payment for work alleged to have been done for the railroad company, and that another member of said firm was an active participant in the fraud which rendered the bonds invalid. *Held*, that plaintiff was not an innocent holder.

Bona Fide Holders of Bonds Issued in Excess of Amount Allowed by Law.—Mortgage bonds of a railroad company issued for a greater amount than that allowed by statute are unauthorized, and might be held inoperative and void as to persons having the right to complain; but as between *bona fide* holders of the mortgage bonds, and the company, the mortgage is a lien upon the mortgaged property. But subsequent creditors of the company, who became such with notice of the invalidity of the mortgage, while the negotiation of the bonds was in progress, occupy no better position than the company itself, and cannot set up its fraud in exceeding the authority conferred as a defense against the victims of that fraud. *Fidelity Ins. T. & S. D. Co. v. Western Pennsylvania & S. C. R. Co.*, 138 *Pa. St.* 494.

Purchasers of Overdue Bonds from Vice-President after Suit to Foreclose had been Begun not Bona Fide Holders.—In *American Loan & Trust Co.*

v. St. Louis & Chicago R. Co., 42 Fed. Rep. 819, it was held by Judge GRESHAM that where overdue railroad mortgage bonds, which belong to the railroad company, are bought at 40 cents on the dollar from the vice-president of the company after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property, the purchasers of such bonds are not *bona fide* holders where inquiry on their part would have shown that the vice-president had no authority to sell the bonds.

Detached Past Due Coupons—Delivery by President of Company to His Wife—Collection Enjoined.—In *Chicago & Grand Trunk R. Co. v. Turner*, 79 Mich. 132, complainant brought a bill in equity to enjoin a suit at law for the collection of certain coupons detached from the bonds of a railroad company, when past due, by the president and majority stock and bondholder of the company, who delivered them to his wife without any consideration being paid for the same. The bonds were afterwards sold by the husband and passed into the hands of complainant, the parties supposing that the sale covered all coupons attached and detached, and not paid and cancelled. Upon a review of the testimony, the court held that such intention must prevail as against the wife, who was not an innocent purchaser for value, and that the coupons delivered to her should be considered as paid when cut from the bonds and so delivered.

DAY

v.

WORCESTER, NASHUA & ROCHESTER R. CO

(151 *Massachusetts*, 302.)

Consolidation of Corporations—Authority of Legislature to Impose Terms.—The legislature may require as a condition of the consolidation of two railroad companies, that the old companies shall not cease to exist, but that the new company shall be the old companies with a different name.

Same—Liability of Consolidated Company—Contract to Exchange Stock for Bonds.—A railroad company consisting of two corporations united by consolidation, is liable on a contract of one of the old companies to exchange stock for bonds, where the act providing for the consolidation makes the new company liable for "all the obligations, debts, and liabilities" and "all claims and contracts" of the old companies. The new corporation is bound to deliver its stock for the bonds of the old company, or to pay the damages occasioned by a refusal.

Following *John Hancock Mutual Life Ins. Co. v. Worcester, N. & R. R. Co.*, 39 Am. & Eng. R. Cas. 227.

ACTION upon a contract to recover damages for the non-issue of shares of stock in exchange for bonds. Plaintiff had judgment below, and defendant appeals.

Action by Robert L. Day, Frank A. Day, and Henry B. Day, copartners under the name of R. L. Day & Co., against the Worcester, Nashua & Rochester Railroad Company, heard by the court without a jury. Judgment was for plaintiffs, and defendant excepts.

Geo. O. Shattuck and Wm. A. Monroe, for plaintiffs.

Richard Olney, for defendants.

HOLMES, J.—This is an action against a corporation formed by the consolidation of the Nashua & Rochester Railroad and the Worcester & Nashua Railroad, to recover damages for a refusal to issue stock in exchange for bonds of the former road in accordance with a provision in the bonds. The facts are the same as in, *John Hancock Mut. Life Ins. Co. v. Worcester, N. & R. R. Co.*, 149 Mass. 214, 39 Am. & Eng. R. Cas. 227, except that it now appears affirmatively that the consolidation actually was carried out on the footing of equality between the shares of both the old corporations and the shares of the new one, as was contemplated by the statute authorizing it, a point which was doubtful before (149 Mass. 219, 220, 39 Am. & Eng. R. Cas. 227, 228), and except that the demand was for stock in the new corporation alone. Case stated.

The argument of the defendant has not been addressed to the technical sufficiency of the demand, but to showing that the former decision should be reconsidered. We do not accede to the argument; but, as there seems to have been some misapprehension of the meaning of the judgment in the former case, we shall add something to what was said there, in the hope of making plainer our point of view.

For the purpose of the decision, we assume that the bonds did not import a contract by the Nashua & Rochester Railroad Company to continue in existence until they were satisfied that the contract in the bonds to exchange them for stock was only binding so long as the Nashua & Rochester Railroad Company was in existence, and that the legislature did not attempt to enlarge or change the liability created by the bonds. Therefore, we do not stop to consider how the defendant can complain of the act under which it has come into existence, and which was voluntarily accepted by its constituent companies. *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 486; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397; *Pitkin v. Springfield*, 112 Mass. 509.

The argument for the defendants tacitly assumes that the Nashua & Rochester Railroad Company has ceased to exist, to all intents and purposes, and concludes that therefore there is no longer an obligation to deliver stock for the bonds,—a conclusion which would follow by the premise which we have conceded. But the very point decided in the case of *John Hancock Insurance Company* was that, by the true construction of the consolidating act, the Nashua & Rochester Railroad Company has not ceased to exist, but that for the present purposes the defendant is that company, with a different name.

Assuming, for the moment, that this construction is correct, there can be no question of the power of the legislature to authorize a consolidation upon those terms. A change of name, an acquisition of new property and rights, or both together, do not necessarily make a change of person. To add another illustration to those suggested formerly: If the legislature authorizes one railroad, which has issued bonds like the present, to buy the franchises, property, and stock of another, and to issue new stock of its own to an equal amount, with an express proviso that the identity of the purchasing road shall remain unchanged, and thereupon the purchase is made, we conceive that there can be no doubt that the purchasing road is still bound to deliver stock for bonds, as before. If the bondholder could not complain of the increased issue, (*Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 12 Am. & Eng. Corp. Cas. 110), it is very certain that the company could not, and least of all on the ground that it was no longer the same company. *Central R. & Banking Co. v. Georgia*, 92 U. S. 665. See *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397, 400.

In the case supposed, the identity of the purchasing road remains unchanged for all purposes. But the law is equally familiar with the preservation of identity for a particular purpose when in other respects it is changed. More than that, it is familiar with an identification of natural persons, which, of course, is wholly feigned, for the preservation and transmission of rights and duties. The heir "is the same person as his ancestor." *Oates v. Frith*, Hob. 130; *Bain v. Cooper*, 1 Dowl. (N. S.), 11, 14. Executors "represent the person of the testator." St. 9 Edw. III. St. 1, chap. 3; Co. Litt. § 337; *Coghil v. Feelove*, 3 Mod. 326; *Bain v. Cooper*, *ubi supra*. Administrators "represent the estate" of their intestate. *North v. Butts*, 2 Dyer, 139b, 140a. Even assigns got the benefit of a warranty to which they were not parties by an attenuated form of the same notion. *Norcross v. James*, 140 Mass. 188, 189. Similar illustrations are referred in *Compton v. Wabash, St. L. & P. R. Co.*, 45 Ohio St. 592, 616, 33 Am. & Eng. R. Cas. 56.

When two corporations are consolidated, no doubt, for most purposes, they cease to exist; and the new corporation is a distinct person in the eye of the law, although it is their "legal successor." *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 180, 25 Am. & Eng. R. Cas. 53. But no fiction is necessary, so far as the legislature sees fit to say that the new corporation shall be regarded as the same with one, or even alter-

Terms of
consolidation.

Identity of
road un-
changed.

Consolidation
of corpora-
tions—Liabil-
ity of suc-
cessor.

nately as the same with each, of the old ones, or, more explicitly, that, although the new corporation is a new person, for the acquisition of new rights, or the making of new contracts, the old corporations shall not be altogether ended, but shall continue under the new name, so far as to preserve all their existing obligations unchanged. *Compton v. Wabash, St. L. & P. R. Co.*, 45 Ohio St. 592, 618, 33 Am. & Eng. R. Cas. 56. If that is made a condition of the consolidation, the consolidating companies do remain in existence to that extent. There is no greater legal difficulty in continuing the liability upon a contract to exchange stock for the bonds than there is for continuing it upon one to pay money for them. In neither case does the legislature say, in terms, that the old corporation shall be taken to remain in existence for this purpose; but, if it requires the end, it implies the means. *Quando aliquid mandatur mandatur et omne per quod pervenitur ad illud.* See *Broughton v. Pensacola*, 93 U. S. 266, 269, 270; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147, 151; *Coffey v. National Bank*, 46 Mo. 140, 143; *Board of Administrators v. New Orleans Gas Light Co.*, 40 La. Ann. 382, 22 Am. & Eng. Corp. Cas. 569.

To our mind, the only really debatable point is not what the legislatures of New Hampshire and Massachusetts could do as against the consolidating companies, but what they did in fact; that is, what is the true construction of the words of the New Hampshire statute of 1883, chap. 239, and of our statute of 1883, chap. 129? *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 362; *Central R. & Banking Co. v. Georgia*, 92 U. S. 665, 670. Upon that point we always have recognized that different minds might form different opinions. To justify our own, it is unnecessary to repeat the very sweeping language of the statute which seems to be as broad as could have been used had the legislatures had this particular obligation in mind. The question is not whether words, on their face insufficient, should be stretched by construction to embrace the obligation in the bonds. It is whether the words "all the obligations, debts, and liabilities," "all claims and contracts," etc., shall be cut down upon some extrinsic reason.

We find no such reason. On the contrary, every extrinsic fact is in favor of giving its natural meaning to the laboriously comprehensive language of the acts. The road of the obligor was let to the Worcester & Nashua Railroad before it was built, by authority of statute. The statute which authorized the issue of these bonds, and required them to be convertible into stock, also required the Worcester & Nashua railroad to guaranty them; and it did so. It paid the interest upon them directly to the bondholders, and its lease was changed so as

to require it to do so. Afterwards it brought about an exchange of the original bonds for others, at a lower rate of interest, but otherwise like the old ones, and mortgaged its road as additional security for them. In 1875 the Worcester & Nashua Railroad was authorized to purchase the bonds and stock of the obligor, providing for the continued exchange of stock for bonds on presentation. Finally the last step was taken of authorizing a consolidation on terms of perfect equality, which was carried out. Under the existing relations of the companies, it was little more than a formal act.

In view of the fact that every step taken was in pursuance of special legislation, it is not to be believed that the most important obligations which there were outstanding were forgotten, or were not contemplated. It is probable that this particular feature of them, which had been protected in 1875, was before the mind of the legislature. The effect of consolidation—if, as we must assume, the terms prescribed and assented to were just—was simply to bring together two groups of shares, of equal value. Justice to the bondholders forbade allowing the Nashua & Rochester Railroad to extinguish itself to their detriment. No injustice was done to stockholders by continuing its existence under the altered name. We must decide, a second time, that, for the purpose of continuing the obligation of these bonds in existence according to their tenor, the defendant is the Nashua & Rochester Railroad Company.

The reasoning which has led us to the conclusion that the defendant is bound to make good the contract of the Nashua & Rochester Railroad to exchange its stock for bonds, and the fact that the Nashua & Rochester stock, if delivered, would have been exchangeable at once for the defendant's stock, share for share, lead us to the further conclusion that the defendant was bound to deliver its own stock, and that the demand was sufficient.

Exceptions overruled.

Liability of Consolidated Company on Debts and Contracts of Constituent Corporations.—See *Louisville, N. A. & C. R. Co. v. Boney (Ind.)*, 39 Am. & Eng. R. Cas. 168, note 176, 229; *John Hancock Mut. L. Ins. Co. v. Worcester, N. & R. R. Co. (Mass.)*, 39 *Id.* 227.

Exchange of Stock for Bonds—Exercise of Option—Reasonable Time—Notice.—In *Catlin v. Green*, 120 N. Y. 441, it was held that the fact that no notice was given to holders of corporate stock to exercise an option given them by contract to exchange their stock for mortgage bonds, will not excuse stockholders who have been guilty of laches in exercising the option, where no such notice was required by the contract. Stockholders who have neglected to exercise an option to exchange their stock for mortgage bonds of another corporation within a reasonable time, where there is no express limitation as to time, and until the stock has become worthless and the assets and property of the corporation have passed into the hands of a re-

ceiver, thus making performance impossible, will be held to have abandoned and waived all right to elect to have such stock exchanged for bonds. The court said: "The trial court found that the plaintiff and the previous owners of the stock were chargeable with laches in the exercise of the option given under the agreement to convert the stock into bonds, and had thereby abandoned and waived all right to elect to have such stock exchanged for bonds, and that the tender and demand was not made within a reasonable time after the right to elect under the agreement to convert the stock into bonds had accrued. This finding appears to conform to the rule that where an option to be exercised, or a condition to be performed, is not limited by the agreement, such option must be acted upon and the condition performed or abandoned within a reasonable time, and this is well sustained by authority. *Fitzpatrick v. Woodruff*, 96 N. Y. 561-565; *Wooster v. Sage*, 67 N. Y. 68; *Johnston v. Trask*, 40 Hun (N. Y.), 415, 116 N. Y. 136-143; *Vyse v. Wakefield*, 6 Mees. & W. 442-451. The appellant contends that the doctrine of estoppel lies at the foundation of the law as to waiver, that while one party has time and opportunity to comply with a condition precedent, if the other party does or says anything to put him off his guard, and induce him to believe that the condition is waived or that strict compliance will not be insisted on, he is afterwards estopped from claiming non-performance of the condition. This we may concede. But what has the defendant done or said that has put the plaintiff or the former owners of the stock off their guard, or induced them to believe that strict compliance would not be insisted upon? Our attention is called to no such word or act of the defendant, and in our examination of the case we fail to discover any. It is further contended that no notice was given by the defendant to the plaintiff or former owners of the stock to exercise the option, or that it would be deemed abandoned. Very true, but no such notice was required by the provisions of the contract, or by any rule of law to which our attention has been called. It appears from the testimony that the stock issued to the Brooklyn, Winfield & Newton Railway Company for its lease was soon thereafter, and before the mortgage bonds had been issued, indorsed by its treasurer in blank, and transferred to other parties. The transfer, however, was never entered upon the books of the company, so that the defendant or the officers of the North Second Street & Middle Village Railway Company had no means of knowing who were the holders of the stock. The plaintiff or the prior owners of the stock had the right, within a reasonable time after the mortgage bonds had been issued, to present their stock at the company's office, and have it exchanged for bonds. But this option should have been exercised within a reasonable time. The holding of the stock for upwards of nine years until it had become worthless and the company insolvent, and until its property and assets had passed into the hands of a receiver, thus making performance impossible, amounts to gross laches and a waiver of the right to exercise the option and demand performance."

POLHEMUS

v.

FITCHBURG R. CO.

(123 New York 502.)

Consolidation—Action Against New Company on Mortgage Bonds—Construction of Statute.—New York Laws, 1869, chap. 917, § 5, providing for the consolidation of corporations, provides that "all debts and liabilities incurred by either corporation, except mortgages, shall thenceforth attach to such new corporation and be enforced against it and its property." *Held*, that by the excepting of mortgages from the liabilities of the new company, the bonds themselves secured by the mortgage are not also excepted, and an action may be maintained against the new company on the bonds and coupons of one of the constituent corporations.

RUGER, C. J., EARL and FINCH, JJ., dissenting.

APPEAL from the Supreme Court, General Term, Second Department.

Action to recover upon certain due and unpaid interest coupons. Defendant appeals from a judgment of the General Term affirming a judgment for the plaintiff recovered below.

John H. Peck, for appellant.

Charles E. Patterson, John B. Gale, and George L. Nichols, Jr., for respondent.

GRAY, J.—The plaintiff, being the holder of bonds of the Troy & Boston Railroad Company, has sued the defendant to recover upon certain due and unpaid interest coupons, upon the ground that by the consolidation of his company with the Fitchburg Company the obligation of meeting that liability was assumed by this defendant, as the new corporation, by force of the act of consolidation. The defense to the suit is that by the terms of the statute authorizing the consolidation the defendant is exempted from such a liability. The defense is purely a technical one, and, if allowed to prevail, will have the result, obviously enough, of depriving the various holders of these bonds of valuable property rights, which they had every reason to believe themselves secure in: for the bonds represented an obligation of the Troy & Boston company to pay upon the principal, annually, 7 per cent. interest until the day of their maturity. As a matter of familiar knowledge to all, such a form of security, for the payment of which, according to its tenor, all the obligor's fran-

Case stated.

Nature of defense.

chises, properties, and revenues were mortgaged, would induce the investment of their moneys by all who desired a well secured corporate obligation, bearing the highest legal rate of interest, and having a long period of existence. From the reading of the consolidation plan, as developed by the agreement of the companies, it is plain enough that a leading principle is to alter the obligation represented by these bonds, so that no more than 4 per cent. interest should be paid by the new company on that particular amount of indebtedness. It is also quite evident from this plan that the stockholders will gain materially by the difference in the interest payments, and will receive from the proceeds of the Troy & Boston property in this consolidation an amount of stock measured by the saving of interest.

The question for us to decide is whether this scheme is sanctioned by the statute, and if under its cover, the bondholders can be deprived of those rights and remedies which they had previously enjoyed. The consolidation

Consolidation
—Statute.

is under and subject to the statute, and if it is open to such a construction as the appellant claims, it is difficult to see how a great wrong is not permitted. By an act of the legislature, passed in 1869, (Laws, chap. 917,) the consolidation of railroads was authorized in certain cases, of which this is one. By its third section the parties to the agreement of consolidation are created one corporation. By its fourth section all the rights, privileges, exemptions, and franchises of each corporation, and all of its property, real, personal, and mixed, its debts and other things in action, are vested in the new corporation. Its fifth section reads as follows, viz.: "§ 5. The rights of all creditors of, and all liens upon, the property of either of said corporations, parties to said agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it." The defense here is based on certain words in that section, and the argument is, in effect, that by the excepting of mortgages from the liabilities, which are made to

Statute does
not except
bonds.

attach to the new corporation, the bonds themselves, to which the mortgage was a collateral security, are also excepted. This seems to be somewhat startling as a proposition, whether we view it in the light which a usual and correct use of the English language affords, or whether we view it in connection with the legal fact that by the con-

consolidation a transfer of the properties and franchises of the debtor is affected and its earning capacity annulled. The statute under which the defendant is organized was passed to authorize the consolidation of companies owning continuous or connected lines of road. Naturally it has reference to solvent or going concerns, and the force of its authority is in the direction of empowering corporations to do what otherwise they could not do. Its evident object is to enable corporations so situated to unite their business means and facilities when it seems to their mutual advantage. For this statute, which we may presume to have been enacted with a public and liberal end in view, to be construed, nevertheless, in such wise as to legalize the impairment of promises made to creditors, we should find language so unmistakable and words so explicit as to make such a legislative intent patent. The natural idea of such a statute, I take it, is that the new corporation, which springs from the two consolidating corporations, represents each one, as well in its duties or obligations assumed to others, as in its right to enforce performance by others of their obligations. The idea of a transfer of properties and franchises involves, as the correlative idea, an assumption of those duties and obligations which were predicated upon the possession and operation of such properties and franchises, and which gave strength and inducement to corporate promises. And this idea is, in my opinion, what underlies the legislative act, and not the one which the appellant seeks to inject into it, and which so strongly shocks the moral sense. The legislature, after having vested in the new corporation all the rights, franchises, properties, and claims of each party to the consolidation agreement, proceeds, in this fifth section, to define the position of the creditors of each. It preserves their rights and their liens, acquired against or upon the property of the corporation, and each corporation is continued in existence solely for that purpose. It provides that "all debts and liabilities incurred by either corporation, except mortgages, shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if said debts or liabilities had been incurred or contracted by it." Omit

♦ **Mortgage only
collateral
to debts.**

the words "except mortgages," and the new corporation would fill the precise position towards creditors which each corporation had filled. What does their insertion accomplish? They are ill calculated to express anything in the legal sense; for "mortgages" mean the instruments which charge property with the liability to make good the debt its owner has contracted. They may be said to describe a property liability, but never to describe

the principal debt, or promise, which is evidenced by the promissory note or bond of the property owner. They are collateral, or incident to, the debt itself, and where made, as here, to secure the payment of bonds, they cannot properly be termed the debt, or liability, of the obligor, but only the liability charged upon his property.

The argument for the appellant is that we must supply the sense which is wanting in the words, and should read the clause as excepting mortgage debts, and that such a reading would exempt the new corporation from any liability upon the bonds of either corporation. I think several considerations militate against this course of reasoning. In the first place, it is a rule in the interpretation of statutes that where a sense is to be supplied to inaccurate or incomplete words in an enactment, that sense which works an injustice should be avoided. In the next place, to except mortgage debts from the debts and liabilities which are assumed by the new corporation does not operate to except the corporate liability upon the bonds, unless we are willing to adopt a vulgar or careless and inexact use of language. In construing language so fraught with important consequences to the rights of persons, we ought to give to its words their precise and natural sense, and not force from them a meaning which strains construction and works a wrong. If the legislature had meant to except the personal debts or obligations, that is, the bonds themselves, it is altogether a more natural supposition that it would have used language importing that much. It would have said, "except bonds and mortgages." To refer to popular expressions, we all know that in speaking of the liabilities of railroad companies men mention their "bonded debt," and speak of the "bonds outstanding;" and they inquire as to the extent of the company's earnings beyond an amount sufficient to meet the interest on its bonds. But it is possible for us to attach a sense to the words "except mortgages," which is more natural, and avoids our sanctioning the impairment of a corporate obligation. The word "mortgages," taken in its literal sense, and as it would be employed by persons dealing with legal rights, or in affecting legal conditions, means the liability impressed by the company upon the property then owned, or thereafter to be acquired, and to except mortgages means to confine the property lien created by a mortgage to the property theretofore held by the consolidating company. Railroad mortgages are known to contain clauses for extending their lien to future acquisitions of property, or extensions of road, and by their exception in the clause under consideration such a consequence would be prevented. We need not consider the legal

Construction
of act—Sup-
plying sense.

probability of such a result in this case, although we have been referred to a decree of the federal court for the northern district of Ohio, in *Farmers' L. & T. Co. v. The Toledo, etc., R. R. Co.*, extending a mortgage lien to property acquired after consolidation by the new company. We need only see a reason for the legislature's inserting the exception. If we read the words simply and naturally, they merely emphasize the understanding that all liens remain as they were before consolidation,—neither impaired nor extended. Questions and complications which might be raised by the ingenuity of minds, as to the *status* of the mortgages of consolidating companies, are set at rest. It may be surplusage; but that criticism is not infrequently invited by legislation. Except for these words it is conceded that the consolidated company is liable upon the bonds of the consolidating companies; and because of their insertion it is insisted that the bondholders are remediless to enforce performance of their debtor's obligation other than by a foreclosure of the mortgage. That would be a most inequitable and harsh rule. It discriminates against the bondholder. The act professes to save the rights of all creditors, and yet only the general or unsecured creditors can hold the new company upon the liabilities of the consolidating company. The consolidating companies are solvent, and they are divested of their property and earning capacities in favor of the new company, which thus is enabled, by operation and use of the acquired property, to appropriate its earnings. If it refuses to discharge the full obligation incurred by a consolidating company in its bonds, we are asked to hold that the bondholder is at its mercy and bound to accept what it is willing to pay him, or to foreclose his mortgage. Manifestly, as in this case, that is a process for forcing the bondholder out of his contract, which should not meet with the favor of courts of equity. If here the defendant can compel the plaintiff, and those similarly situated, to accept payment of the principal and interest of their bonds, it would be in a position to effect a new loan at a less interest rate, which means a very great saving and a consequent benefit to the stockholders. Shall we ascribe to the legislature a purpose to benefit stockholders at the expense of bondholders, practically to give an advantage to the debtor over his creditor? The inequity and as well the iniquity of the thing seem most apparent. Except in bankruptcy courts, the secured creditor is never obliged to resort to his security in the first order, or to surrender it if he wishes to come in and claim with other creditors. The rule in equity imposes no such obligation to cases of solvency or of insolvency, and yet here, in a case of the transfer of its franchises, properties, and

chooses in action, by a solvent corporation to another, for the purpose of operation and use, conjointly with those of another corporation, under the authority of a statute, which purports to preserve the rights of all creditors, and to give them a claim upon the new corporation, it is insisted that the creditor, who holds a bond, has no rights against the new corporation at all; that that obligation is practically extinguished. The liability of the old corporation to earn money by operation of its chartered franchises is taken away; for it is divested of its properties, and thereby the remedy by action and judgment for the interest, where payment has been refused to be made by the company, is rendered futile. I think the legislature never intended such a condition of affairs to result from consolidation under the statute, and that it is doing violence to language and to the rules for the construction of statutes to imply such an intention. The true theory of this act is that each consolidating company survives in the consolidated company, and that it represents each company in its claim and its obligations; but as to mortgage liabilities the properties acquired remain affected only as they were affected before the consolidation. Whatever the liability created by the mortgage instrument, it shall not be deemed to be extended, or to affect the new company otherwise than might result from a foreclosure. In the case of *Vilas v. Page*, 106 N. Y. 439, ANDREWS, J., speaking of this statute of consolidation, uses language which, while the case does not involve the same question as here, is yet significant as to the scope of the act. He says it "saves the rights of all creditors and bondholders of any company embraced in the consolidation authorized by that act." How is that the case, if bondholders may not look to the consolidated company for the fulfillment of the current obligation to pay the interest upon the bonds of the several companies, but must look to the corporation which has practically ceased to exist? The franchises and properties which, by operation, had furnished the means for meeting the personal liability, have been vested in and are used by the new company. The rights of bondholders are not saved if, by the act of consolidation, the right to enforce the principal debt is extinguished, and they are remitted to their collateral security. I think every legal and moral consideration demand that we affirm this judgment, with costs:

ANDREWS, PECKHAM, and O'BRIEN, JJ., concur; RUGER, C. J., and EARL and FINCH, JJ., dissent.

Consolidation of Corporations—Liability of New Company for Debts of Constituent Corporations. See *ante* *Day v. Worcester, N. & R. R. Co.* and note, p. 324, 328.

PHELPS.

v.

ST. CATHARINES & NIAGARA CENTRAL R. CO.

(19 Ontario Reports, 501.)

Mortgage Bondholders—Remedy—Right to Seize Earnings of Company.—So long as a railway company is a going concern, mortgage bondholders whose bonds are made a general charge on the undertaking by statute, have no right, even although interest on the bonds is in arrear, to seize the earnings of the company deposited in a bank. Their only remedy is the appointment of a receiver.

APPEAL from a judgment of BOYD, C., reported in 18 Ont. Rep. 581. Reversed.

The following statement is taken from the judgment of FERGUSON, J.:

"An order was made by the local judge attaching in favor of the plaintiff, an execution creditor of the defendants, a sum of money which the defendants had on deposit in the Bank of Commerce at St Catharines, as a debt owing by the bank to the defendants, and afterwards, as I understand, an issue was directed to be tried between certain bondholders and the plaintiffs as to the right to such money. The order has not been left with me.

"On an appeal from the order of the local judge it was decided that while there might be no specific lien over these particular moneys, yet that the bondholders as a privileged body were entitled to be satisfied thereout in priority to ordinary creditors such as the plaintiff, and that unless it could be contended that the bondholders had been paid, an issue between them and the attaching creditor should not have been directed: or rather the learned judge said he did not see for what purpose such an issue should be directed.

"The learned judge held that, it being assumed that the bonds are valid and subsisting securities, it having been shown that the overdue and unpaid interest upon them exceeded the sum in the bank, there was nothing to be attached in respect of which there could be an issue, because the statute protects all the earnings of the company (the defendants) for the benefit of the bondholders upon whose enterprise or capital the undertaking was launched. The bondholders' appeal was therefore allowed, and a certain cross-appeal dismissed, and from this decision is the present appeal."

Collier, for the judgment creditors who appealed.
Hoyles, Q. C., and *Ingersoll*, for the bondholders.

FERGUSON, J.—On the argument before us it was scarcely contended that the learned judge was not right in the view stated, that the scope and effect of the bonds held by the bondholders must depend on the proper construction of section 35 of the Act incorporating the defendants, and not on § 95 of the Dominion Railway Act of 1888. This was, as I thought, conceded.

This incorporating Act is the Provincial Act 44 Vic. chap. 73, (O.) (1881). The material part of the 35th section is: "And such bonds shall without registration or formal conveyance be taken and considered to be the first and preferential claims and charges upon the undertaking, and the real property of the company, including its rolling stock and equipments, then existing and at any time thereafter acquired, and each holder of the said bonds shall be deemed to be a mortgagee and encumbrancer *pro rata* with all the other holders thereof, upon the undertaking and property of the said company as aforesaid."

The money in the hands of the bank and sought to be attached by the plaintiff as a debt owing by the bank to the defendant company is admitted to be money which was tolls and earnings of the company.

The learned judge says in his judgment that in railway parlance, "undertaking" has been defined to mean the completed work from which returns of money or earnings arise, and that a charge on the "undertaking" means that these earnings are destined for the satisfaction of the charge, referring to *Gardner v. London, Chatham, and Dover R. W. Co.*, L. R. 2 Ch. at p. 217, where Lord CAIRNS says: "The tolls and sums of money *ejusdem generis*, that is to say, the earnings of the undertaking must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees, by seizing, or calling on this court to seize the capital or the lands, or the proceeds of sales of land, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed."

Bonds as
charge on
"undertak-
ing"—Au-
thorities.

The learned judge refers also to *in re* Panama, New Zealand and Australian Royal Mail Co., L. R. 5 Ch. 318, and *Blaker v. Hertz & Essex Waterworks Co.*, 41 Ch. D. at p. 407.

Although the language of this § 35 is different from that contained in the English Act, yet when one looks at the English Act and the authorized form of mortgage deed, and takes

into consideration the policy of the law in regard to railway undertakings expressed in so many cases, I think the conclusion to be arrived at is, that the effect of the mortgage bond under this § 35 as against the railway company and their property, is the same as that of the mortgage bond or deed in England. Each seems to me to be a mortgage of the "undertaking."

Lord CAIRNS in the same judgment previously, says: "Moneys are provided for, and various ingredients go to make up the undertaking; but the term "undertaking" is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that the "undertaking" is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete, or to be completed, as a going concern, with internal and parliamentary powers of management, not to be interfered with, as a fruit bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the legislature, must not, under a contract pledging it as security, be destroyed, broken up, or annihilated."

In the case *Re Panama, etc. supra*, GIFFARD, L. J., says: "And I take the object and meaning of the debenture to be this, that the word 'undertaking' necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had accrued for the payment of his principal, and that principal was unpaid."

The same proposition is stated by Mr. Justice KAY in *Blaker v. Herts & Essex Waterworks Co., supra*, and I understand the same to be the meaning of STERLING, J., in the case *Hubbuck v. Helms*, 35 W. R. 574, where the learned judge quotes from Mr. Justice NORTH in the case *Wheatly v. Silkstone, etc., Coal Co.*, 29 Ch. D. at p. 724, and also from JAMES, L. J., in *re Florence Land & Public Works Co.*, 10 Ch. D. 530, where it is said that so long as the company is a going concern the debenture holders are not entitled to interfere with the rights of the directors to deal with any part of the assets in the ordinary course of business. But as soon as the company makes default in payment of principal or interest, or is wound up, or as it seems to me, ceases to be a going concern, the right of the debenture holders arises to ask the court to ap-

point a receiver of the assets, and to realize their security. In the case before STIRLING, J., he was of the opinion that the company had ceased to be a going concern.

In Lindley's Law of Companies, 5th ed., at pp. 196 and 197 the law is stated generally in this way: "If, as is usually the case, it (the debenture) purports to give the holder a charge on the undertaking or the general property of the company, the charge given is what has been called a floating security, that is, it charges the property of the company for the time being, but does not prevent the company from dealing with the property in the ordinary course of its business. Consequently, if a company, after having issued debentures of this nature, mortgages a specific part of its property in the ordinary course of its business, or to obtain an advance of money necessary to carry on that business, the specific mortgagee, whether he had notice of the previous issue of debentures or not, has priority over the debenture holders. On the appointment of a receiver by a debenture holder, or on the commencement of a winding up, the floating nature of the security is at an end, and the charge then becomes effective on the property of the company existing at that time, but not as a rule on capital which has not been called up."

In Kerr on Receivers, 2nd ed., at p. 55, it is said that the appointment of a receiver is the only remedy open to the holders of mortgage debentures of a railway; the right to foreclosure or sale is denied to them. Reference is made to the case *Furness v. Caterham R. W. Co.*, 25 Beav. 614, in which the Master of the Rolls points out the inconvenience of granting either a sale or foreclosure whereby the benefit of the line of railway might be lost to the public; the same case in 27 Beav. 358.

In the case *Simpson v. The Ottawa & Prescott R. W. Co.*, 1 Ch. Cham. 126, the duty of a receiver of a railway company is pointed out as being to receive the gross receipts of the company for the carriage of passengers, freight, mails, etc., and to pay the bills for running expenses thereout. The words in the judgment at p. 129 are: "Out of the moneys so received by him he pays the expenses of the undertaking, and the interest of the mortgagees, and the balance into court." These are in a quotation from Sir John Romilly in the case *Ames v. The Trustees of the Birkenhead Docks*, 20 Beav. at p. 350.

In *Peto v. The Welland R. W. Co.*, 9 Gr. 455, it is shown that the appointment of a receiver is the proper remedy of a judgment creditor of the company who has an execution against lands, and the impracticability of selling the lands is pointed out by the learned judge.

I have examined a large number of authorities bearing more or less upon the subject. It is nevertheless entirely possible that I have not imbibed the correct idea, and I have the greater hesitancy owing to the well known accuracy of the learned judge whose decision is under review. The conclusion, however, that I have arrived at is that so long as the undertaking is a "going concern," these bondholders have not a right, even though interest on their bonds be overdue and unpaid, to seize, or take or sell or foreclose any part of the property of the defendant company by virtue of the mortgage bonds, and that the remedy—the sole remedy—is as stated in *Kerr on Receivers*, p. 55, before referred to, namely by the appointment of a receiver, in which case the undertaking would be continued a going concern, the intention of parliament carried into effect, and the interests of the public in the undertaking preserved, unless and until a "winding up" or some other fatal disaster should become the inevitable.

**Bondholders
have no right
to seize earn-
ings.**

If on the contrary of this the bondholders had the right whenever interest was overdue and unpaid to claim any and every sum of money earned by the undertaking, that could be found by them, and acted according to such right, the consequence would be that the undertaking must cease to be a going concern, for a management of it would not under such circumstances be reasonably possible.

If there were nothing more to be said, I should be of the opinion that these bondholders are not entitled to the money in question by reason of their being such holders even though there is overdue interest unpaid.

The case *Swiney v. The Enniskillen, etc. R. W. Co.*, 2 Ir. R. (C. L.) 338, seems to me to have a very important bearing upon the question. There, money that had been tolls of the railway company became an acknowledged debt from another company under circumstances that I need not detail here. It was garnished by a creditor of the company. Debenture mortgagees of the tolls of the defendant company moved to discharge the garnishee order. There was some contention based on the ground that the order was absolute, but it was opened up by the court, at all events, for the purposes of the motion. In the argument it was admitted that it had been open to the mortgage bondholders to have had a receiver appointed, from which I assume that some interest or principal was overdue and unpaid.

The learned judges, apparently gaining some of their light from English decisions, in deciding against the contention of the bondholders seem to emphasize the fact that nothing had been done by the bondholders by way of putting themselves

in a position to realize upon their bonds, and the fact also that the moneys in question were not unpaid tolls. FITZGERALD, J., at p. 347 said: "If this sum of money sought to be attached had consisted of unpaid tolls, a nice question would have arisen; but upon that it is unnecessary for us to express any opinion, for it appears by the admission of the Irish North Western Company, that this sum represents tolls actually received. It appears to me, therefore, that these debenture holders can, under the circumstances, establish no claim to it. It would have been impossible for them to have touched it in the hands of the Enniskillen, etc., Co., and, therefore, they have no grounds for coming here," etc. (This Enniskillen Co., were the company that issued the bonds).

Some of the other judges take the same grounds and liken the case of the bondholders to that of the mortgagee of lands seeking to obtain rents of the lands that had been paid over to the mortgagor before he the mortgagee had given any notice or done any act to obtain possession of the land. GEORGE, J., however, I think, grounded his judgment on the garnishee clauses of the Common Law Procedure Act.

In the present case I incline to think that the money in the hands of the bank was so there as to make the bank a debtor to the defendant company, but all the evidence on this subject is not here. In the affidavit of Mr. Cross the banker, he says: The account at which the money was is headed, "St. Catharines and Niagara Central Railway Co., Traffic Account, Richard Wood, Secretary-Treasurer." He says when moneys were drawn from the account the checks were similar to the one shown him, and that is not here. I do not know what it was like. He also says that at the time of the opening of the account a copy of some resolution was shown him. That also is not here, and I do not know what it was.

Bank a
debtor of com-
pany.

Some of the affidavits show that this money belonged to the Michigan Central Railway Co., and that it was intended to be paid them as soon as the accounts between the two railway companies could be adjusted. The use of the word "belonged" may however be taken I think to mean no more when taken in conjunction with some other parts of the evidence than that a part of it had been received to the use of that company, and that it was intended to pay to them this sum in liquidation of that and other demands. There is not here, I think, evidence enough to show that this was not a debt owing from the bank to the defendant company, and if it was such a debt I see no good reason why the plaintiff should not have the benefit of the garnishee clauses of the Act. I refrain from deciding that it was or was not a debt from the bank to

the defendant company, because I have not all the evidence.

I am of opinion, however, that the bondholders had not and have not a right to this money, and I am very humbly of the opinion that the judgment appealed from should be reversed.

ROBERTSON, J.—The 35th § of the Act incorporating the St. Catharines and Niagara Central Railway Company, 44

Act of incorporation.

Vic. chap. 73 (O.), declares that the directors of the company, after the sanction of the shareholders shall have been first obtained at any special or general meeting, called for that purpose, etc., shall have the power to issue bonds for the purpose of raising money for prosecuting the said undertaking, and such bonds shall, without registration or formal conveyance, be taken and considered the first and preferential claims and charges upon the undertaking, and the real property of the company, including its rolling stock and equipments, then existing, and at any time thereafter acquired, and each holder of the said bonds shall be deemed to be a mortgagee and incumbrancer *pro rata* with all the other holders thereof, upon the undertaking and property of the said company as aforesaid.

The plaintiffs are judgment creditors of the defendants the St. Catharines and Niagara Central Railway Company, to the amount of \$1,063.73. The garnishees, the Canadian

Facts.

Bank of Commerce, have on deposit to the credit of the traffic account of the defendants \$587.72; the claimants are holders of the company's bonds issued under and by authority of the above section of the defendants' Act of Incorporation, and there are issued under that section, bonds to the amount of £46,000 sterling: and the question is whether this sum on deposit in the bank can be attached to pay the plaintiff's judgment in priority to the claim of the bondholders.

The matter comes before this court by way of appeal from the judgment of the learned chancellor who allowed an appeal by the bondholders against an order made by the learned local judge of the High Court at St. Catharines, directing an interpleader issue to be tried between the bondholders and the execution creditors as to whether the former are entitled to the said sum as against the said creditors.

The moneys in question are the earnings of the said road, and the question is whether these bondholders by virtue of these securities have a preferential claim upon them.

I have had the advantage of reading and considering my brother FERGUSON'S judgment, and the cases referred to by him, and I have come to the same conclusion that he has arrived at. I cannot see how any ordinary creditor could enforce his claim if it were held that the bondholders had a right

to step in and seize the daily earnings of the undertaking after they are deposited in the bank. The whole of the undertaking, including the rolling stock and all other loose property belonging to and used in the working of the railway, is charged with the payment of the bonds or debentures, but nothing more as I understand it. If then these bonds or debentures are in default the only remedy open to the holders is the appointment of a receiver. The undertaking is still a going concern, and its earnings would then be applicable after the payment of all running expenses, etc., to the payment of interest and principal due on the bonds, etc. But so long as the undertaking is in the hands of the company and is being worked by them, the bondholders in my judgment are not in a position to claim against ordinary creditors payment to them of any money which may be due to the company in the hands of any of its debtors. I am therefore of opinion, with great deference, that the judgment appealed against should be reversed, and with costs.

**Bondholders
cannot seize
earnings.**

WATJEN *et al.*

v.

GREEN.

(*New Jersey Court of Chancery, May 20, 1891.*)

Subscription for Railway Bonds—Tender of Price—Construction of Agreement.—A subscription agreement for railway bonds provided that the subscription price should be paid in installments upon call by the vendor, of which notice should be given, and also required the vendor, previous to any payments, to deposit all the bonds where they could at any time be had for delivery, and did not contain any expressions which would indicate that the provision for call had been inserted for the benefit of the vendor. *Held* that, without waiting for a call, the buyer was at liberty to at any time tender and pay the price agreed upon, and demand the bonds subscribed for.

In Executory Agreements for the Sale of Chattels, the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions, in the nature of mutual conditions precedent; and neither vendor nor buyer can enforce the contract against the other without showing performance, or an offer to perform, or averment of readiness or willingness to perform, upon his part.

ON appeal from determination of receiver.

A. Q. Keasbey, and *J. A. Shoudy*, for appellants.

John P. Stockton, Att'y Gen., and *Howard Mansfield*, for receiver.

MCGILL, Ch.—This appeal is from the disallowance of a claim presented to the defendant receiver by Messrs. Watjen, Toel & Co., who allege themselves to be creditors of the North

River Construction Company, an insolvent corporation. The principal business of the insolvent company was the construction of the New York, West Shore & Buffalo Railway through the state of New York. In process of building that railway the insolvency occurred, and, upon application to this court, the defendant was appointed receiver. The proofs exhibit that the construction company was paid for its work in building the railway in the stock and mortgage bonds of the railway company, and that it became necessary for it to find a market for large quantities of those securities. Among other measures adopted by it in their disposition was a subscription agreement, known, in its affairs, as "the agreement of June, 1881." That document, after reciting that the New York, West Shore & Buffalo Company proposed to build a railway from a point on the west side of the Hudson River, opposite the city of New York, to the city of Buffalo, a distance of 425 miles, and to issue its bonds secured by mortgage, payable in 50 years, and bearing interest at the rate of 5 per cent. per annum, payable half-yearly, and that the North River Construction Company had undertaken to build and equip the railway, and to take such bonds, and also capital stock of the railway company, in payment for its work, proceeded to bind the subscribers, for valuable consideration paid to each of them, to pay the construction company par and accrued interest for the amounts of the bonds set opposite their respective names, upon the following, among other, terms and conditions: "*Second.* Ten per cent. shall be paid upon call to C. F. Woerishoffer, treasurer of the North River Construction Company, for which installment receipts in due form shall be given, and thereafter not more than ten per cent. shall be called at any one time. At least ten days' notice shall be given of any call subsequent to the first call. Default in the payment of any installment called as herein provided shall entitle the company, at its option, to forfeit the subscription and all installments previously paid. *Third.* Each subscriber, upon the payment of the entire amount subscribed by him, shall, in addition to the bonds, be entitled to fifty per cent. of the par value of his subscription, in certificates representing the full-paid capital stock of said railway company." "*Fifth.* After forty per cent. has been called in and paid, each subscriber may elect to surrender all his installment receipts except one, and receive therefor thirty per cent. in said bonds, and he shall be entitled to receive bonds for each subsequent payment upon the surrender of the installment receipts, and upon payment in full of his subscription he shall be entitled to the certificates provided for under section third.

Sixth. The bonds subscribed for under this agreement will be deposited with the United States Trust Company for delivery to the subscribers hereto, under the terms hereinabove named, upon a surrender of their installment receipts. Interest at five per cent. per annum will be allowed on all installments paid, and will be adjusted as the bonds are delivered." A firm intimately connected with the appellants, named Fatman & Co., were among the subscribers to this agreement, for bonds of the par value of \$100,000; and to that firm, after \$50,000 had been paid, the construction company issued 10 certificates, each of which bore date on the 26th of August, 1882, and stated that Fatman & Co. were entitled to all the rights, privileges, and benefits, and subject to all the obligations, of a subscription to \$10,000 in said bonds, under the agreement above referred to; that 50 per cent. of the subscription had been paid; that future payments and delivery of bonds must be indorsed on the certificate; that interest upon part payments had been paid to July 1, 1882; that the subscription might be transferred with the consent of the construction company; and when transferred on that company's books, and the transferee should duly enter into agreement to fulfill the remaining obligations of the subscription, Fatman & Co. should be released from liability. Fatman & Co. really subscribed for the appellants, but never either disclosed that fact to the construction company, or obtained its consent to an assignment of their subscription. As each call was made upon Fatman & Co., they drew the money necessary to pay it from the appellants, and paid it, except in two instances, by their own check. They paid, in all, 90 per cent. of their subscription, and received \$80,000 of the bonds. Between the first and second calls upon them more than six months elapsed, and then, after another five months, a third call was made, and then the remaining calls followed at irregular intervals about one month apart. The last payment was made on the 11th of December, 1882. On the 10th of January, 1884, the directors of the construction company resolved to call the balance due for the bonds, but before notice was given pursuant to their resolution the company was adjudged to be insolvent, and the defendant receiver was appointed. On the 11th of March, 1884, the chancellor ordered that all creditors of the construction company present their respective claims, under oath, to the receiver, within four months from that date. Both Fatman & Co. and the appellants had timely notice of this order, but neither of them presented a claim to the receiver. Before the order to limit the time for the presentation of creditors' claims was made, the receiver sent his chief

clerk to Fatman & Co. The clerk opened the subject of his mission to a member of that firm, and, as authorized by the receiver, offered to deliver to Fatman & Co. the stock of the New York, West Shore & Buffalo Railway Company, which, according to the subscription agreement, was to go to them upon the completion of their payments, and to release them from the remaining payment for bonds, or, if they preferred to do so, allow them to buy \$20,000 in bonds at par, then selling for a little more than 50 cents on the dollar, and give them the receiver's due-bill for the excess of the cost over \$10,000. This proposition was taken into consideration by Fatman & Co., but no answer was sent to the receiver. Subsequently the clerk was sent to the firm for the answer, and was told that it had not yet decided what course it would pursue. At neither of these interviews was there any disclosure of the appellants' interest in the subscription. In the meantime the settlement proposed to Fatman & Co. was offered to other similar subscribers for bonds, and accepted by them. The due-bills given in such settlements were subsequently treated as debts of the construction company, and the holders of them were paid dividends upon them after the same rate that other unsecured creditors were paid upon their claims. At a later time the appellants sent a clerk to the receiver to obtain another proposition of settlement, but then the receiver declined to make one; yet his chief clerk intimated that the settlement previously proposed might still be accepted. The assets in the receiver's hands consisted almost entirely of securities of the New York, West Shore & Buffalo Railway Company. Among them he held 200,355 shares of the capital stock of that company; its bonds of the par value of \$10,000,000; and its notes, payable upon demand, for over \$600,000. Beyond these securities, the assets he held were of little value.

In June, 1884, suit commenced to foreclose the first mortgage upon the railway, and the road was placed in the hands of receivers. This suit threatened destruction to the assets of the construction company, and it became apparent that, without some concert of action upon the part of all parties interested in the railway company, a foreclosure sale for a comparatively nominal sum would leave the company with nothing but a valueless name, and fail to produce anything for its creditors. In this emergency the defendant applied to the court in which the foreclosure was pending, and obtained leave to intervene in the suit, and then, in order to gain delay, interposed defenses. At the same time, to obtain the active assistance and co-operation of the stockholders of the construction company by securing for them the possibility of a

partial payment of their stock, in June, 1885, he called a meeting of the larger creditors of the construction company, and represented to them the situation of affairs, and the advantage of a compromise of their claims at an amount which would admit of a dividend out of the assets to the stockholders. The result of these overtures to the creditors was, in short, that practically all of them except the appellants, who had not presented their claim, agreed to accept one-half of their claims in full satisfaction of them. Later in July, the banking house of Drexel, Morgan & Co., in New York city, proposed a scheme to the holders of the first mortgage bonds of the railway company, by which, upon a sale of the railway to the New York Central & Hudson River Railroad Company, 50 cents upon the dollar of their holdings would be paid. The defendant became a party to the negotiations of Drexel, Morgan & Co. with the New York Central & Hudson River Railroad Company, and, by means of the co-operation of the stockholders and creditors of the construction company, sold the assets of the latter company for \$6,000,000 in first mortgage bonds of the West Shore Railroad Company, the purchaser at the foreclosure sale of the railway of the New York, West Shore & Buffalo Railway Company which were guaranteed by the New York Central & Hudson River Railroad Company. These bonds he subsequently disposed of for a fraction less than par, and, out of the proceeds of sale, was enabled to pay the creditors of the construction company the full amount that they had agreed to accept in satisfaction of their claims, and also to pay the stockholders of the same company 31 per cent. of the par value of their stock. The appellants held 400 shares of the construction company stock, and, sharing in the dividends to stockholders, they are entitled to and will receive 31 per cent. of its value from the defendant. If the defendant had not compromised with the creditors, and had been able to realize as he did from the assets in his hands, the stockholders would not have had 5 per cent. upon their stock. He has now in his hands sufficient assets of the construction company, in the shape of bonds of the West Shore Railroad Company and undistributed moneys, to pay the appellants' demand, but he insists that they have neither legal nor equitable right to payment.

The appellants claim that the construction company should have called upon them for the final payment of \$10,000 on the 12th of January, 1883, and that upon their paying that sum they would have been entitled to receive \$20,000 in first mortgage bonds of the New York, West Shore & Buffalo Railway Company, which were then worth \$14,350, and \$50,000 of the capital stock of

Time for calling in payments.

the same company, then worth \$14,625; that the total value of those bonds and stock was then \$28,975, from which the \$10,000 to be paid should be deducted, leaving the balance \$18,975, which, with interest from January 12, 1883, is their claim. The first difficulty I have in approving this claim is with the arbitrary date upon which it fixes the default—January 12, 1883. The company was not under obligation to call the final payment at any specified time. The seven months that elapsed between the first and second calls was acquiesced in by the subscribers as proper, and following that period a lapse of five months before the third call was also acquiesced in. I fail to find either in the company's necessities or practice in calling for payments, or in the terms of the subscription, anything to justify the arbitrary selection of January 12, 1883, as the time for the last call. Nor do I think that anything had been shown which indicates that the date so fixed was a reasonable time within which the call should be made, if expiration of reasonable time can avail the appellants to pay. The terms of the subscription did not forbid the payment by the appellants without a call or demand upon them by the company. The provision for calls was obviously intended for the protection of subscribers against an unexpected demand. The amount of each call was limited, and the company was obliged to give a prescribed notice before it could compel payment or forfeit a subscription; but no provision in the agreement forbade the subscribers paying their entire subscription at any time, and demanding of the company performance of its part of the contract. On the contrary, the sixth paragraph of the subscription agreement required the company to deposit bonds and stock to the amount of the entire subscription in advance of all payments, and by its very terms exhibits that the company was to be ready to take all cash at any time, and that the calls were solely for the benefit of the subscriber. It was within the appellant's power, for more than a year before the construction company's failure, to have tendered the amount unpaid upon its subscription (Cook, Stocks, § 106; 5 Wait, Act. & Def. 549), and the testimony shows that if such a tender had been made then, and performance had been demanded, the construction company was able to fully perform its part of the contract. But both the appellants and the construction company remained inactive. Neither sought to put the other in default; neither made either a demand or a tender.

It is a general rule, in executory agreements for the sale of chattels, that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions, in the nature of mutual conditions precedent, and that neither can en-

force the contract against the other without showing performance, or offer to perform, or averment of readiness and willingness to perform, upon his own part. 2 Rule as to executory agreements for sale of chattels. Benj. Sales (Corbin), § 897. I am unable to distinguish this case, in principle, from *Hapgood v. Shaw*, 105 Mass. 276, where there was an agreement to deliver some guns on the 1st of June next, or when the delivery should be ordered previous to that date, upon payment of a balance due. Until June 6th the seller did not offer to deliver, or demand the balance to be paid, and the buyer did not either offer to pay, or demand delivery. On June 6th the seller requested the buyer to take the guns. Two suits were brought. The seller sued for the balance due upon the guns, and the buyer sued to recover back the moneys he had paid in advance. The court held that neither party was in default. WELLS, J., in delivering the opinion of the court, said: "If either would charge the other upon the agreement, he must put him in default. He must show a refusal by the other party to perform, or some act or neglect on his part which may be regarded as equivalent to a refusal. Unless excused from performance on his own part, where the refusal of the other party to perform, or some conduct equivalent to a refusal, he must show that he has offered to perform his part of the agreements, or, at least, that he gave notice of his readiness to perform, or, being thus ready, requested performance by the other party. Failing to do that, he cannot charge the mere neglect of the other party to take any action as a refusal to perform or a breach of the agreement." I am of opinion that at the time of the insolvency there was no breach of the subscription contract upon the part of the company of which the appellants could take advantage.

Now, coming to the receiver, it is perceived that his proposition of settlement to Fatman & Co., the only parties appearing by the books of the construction company, or known to him, to be interested in their subscription, was substantially an offer to perform the contract. The appellants had \$10,000 to pay, for which they were to have \$20,000 in bonds, rated at par, and \$50,000 in stock at par. The bonds were then selling at a little more than 50 per cent. of their par value; and the receiver said: "Retain your ten thousand dollars, and go into the market with it, and buy twenty thousand dollars' worth of bonds, and I will deliver to you your stock, and give you a due bill for whatever you shall pay for the bonds above ten thousand dollars, and you shall hereafter receive upon that due bill the dividends which shall be paid to other creditors of the company; or, if you prefer it, I will deliver to you your stock,

Receiver's proposition of settlement.

and release you from the payment of the ten thousand dollars, retaining the bonds that are due you." According to the market rates then prevailing, the acceptance of either proposition of the receiver would have entailed but trifling loss upon the appellants. They, however, ignored the proposition, and, instead of making a definite demand upon the receiver, sent a clerk, in the name of Fatman & Co., to, if possible, draw from the receiver another offer of some kind. At this point further negotiations respecting the claim ceased. In the following March an order to limit the time within which claims might be presented to the receiver was made, and extensively advertised; but the appellants, though aware of the limitation, suffered the time limited to pass without presenting any claim to the receiver. But after the limitation had expired more than sixteen months, and after other creditors had accepted 50 per cent. of their claim in full payment of them, and after the appellants had themselves either become entitled to or actually derived advantage from the compromise with those creditors in the shape of a substantial dividend upon the stock of the construction company which they held, they applied for leave to present their claim to the receiver, and, two years after his appointment, make their first demand. The court, notwithstanding the laches and questionable conduct of the appellants, allowed them to present their claim, but merely for the purpose of investigation; expressly reserving the right to refuse to admit it, wholly or partially, to a dividend, as justice and equity might require. The appellants do not now offer to pay the receiver the last installment of their subscription. They have never put themselves in position, either with the construction company or with him, to legally claim a breach of the subscription agreement. They therefore stand without legal right. What right have they in equity and justice? I think precisely that which the receiver offered them immediately after his appointment; that which was accepted by others who were in a situation similar to the one now occupied by them. The appellants have retained their \$10,000. With it and \$650 (the proofs show that the market for the bonds at that time was 53½ cents on the dollar), they might have purchased \$20,000 in bonds. The receiver should pay them the same dividend upon the \$650 excess over the \$10,000 that he paid other creditors, that is, 50 per cent. or \$325. And he should deliver to them 500 shares of the capital stock of the New York, West Shore & Buffalo Railway Company. He has the stock, and is able to make such delivery. It is true, the stock is now substantially valueless; but the company is not extinct. Costs will not be allowed to either party.

Contracts of Subscription to Railway Bonds.—See *Pettibone v. Toledo, C. & St. L. R. Co.* (Mass.), 36 Am. & Eng. R. Cas. 227.

Fictitious Increase of Indebtedness—Validity of Bonds—Constitutional Provision.—The provision of the Pennsylvania Const. § 7. art. 16, prohibiting the fictitious increase of corporate indebtedness, does not apply to the sale of the mortgage bonds of a railroad company for which it receives the money from innocent purchasers at par, for construction and equipment; the debt is not fictitious though the securities may turn out to be largely so. *Fidelity Ins. T. & S. D. Co. v. Western Pennsylvania & S. C. R. Co.*, 138 Pa. St. 494.

Extension and Time of Payment of Interest on Bonds.—In the case of *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, the defendant executed a mortgage, providing that, on default for six months in the interest on the bonds secured, the principal should become due, at the option of the trustees, and a majority in interest of the bondholders might instruct the trustees to sell the property, or to reverse their election, and extend the time of payment of the interest, but that the action of the trustees or the bondholders, in case of a default, should not affect any subsequent default. *Held*, that a majority of the bondholders could not extend the time of payment of interest until after a default therein of six months.

Decree Cancelling Bonds and Mortgage—Action by Bondholders and Another Company Charging Fraud in Obtaining—Sufficiency of Allegations.—A decree in equity, cancelling bonds of one railroad corporation and a mortgage of a second railroad corporation of its property to secure their payment, upon a bill filed by the latter against the former and the trustee under the mortgage, binds all the bondholders, unless obtained by fraud. And a bill afterwards filed by bondholders not personally made parties to that suit against those two corporations and a third railroad corporation alleged to claim a right in the property, by purchase or otherwise, prior to the lien of the bondholders, charging fraud and collusion in obtaining that decree, cannot be maintained without proof of the charges, if the second and third corporations, by pleas and answers under oath, fully and explicitly deny them, and aver that the third corporation had since purchased the property in good faith and without knowledge or notice of any fraud or irregularity in obtaining the decree. *Beals v. Illinois, Mo. & Tex. R. Co.*, 133 U. S. 290.

Pacific Railroad Bonds—Payment of Percentage to United States—What Constitutes Current Expenses.—In *United States v. Central Pacific R. Co.*, 138 U. S. 84, it was held that since the passage of the act of May 7, 1878, 20 Stat. 58, chap. 96, § 1, (the Thurman act), the sums expended by the Central Pacific R. Co., for betterments and improvements on its road, its buildings and equipments, whereby the capital of the company invested in its works is increased in permanent value, are not to be regarded as part of its current expenses to be deducted from its gross receipts in reaching and determining the amount of the net earnings upon which a percentage is to be paid to the United States. The case of *Union Pacific R. Co. v. United States*, 99 U. S. 402, distinguished from this case.

Foreclosure—Purchase of Road by Bondholders—Exercise by Bondholder of Option to Come in.—In 1859 a bill was filed to foreclose a mortgage given by the Northwestern R. Co., the decree entered thereon authorizing such bondholders as should become purchasers to pay their bids in bonds. The railroad was purchased by Hirst for certain bondholders, and a master was appointed to report distribution and the form of the conveyance. The master reported that Hirst purchased on behalf of certain bondholders named, not including plaintiff, and of such others as might wish to join in the purchase and pay their proportions of the purchase money and expenses, and that the property was bought to sell again in such manner as

three-fourths of the bondholders should direct. The master also reported a form of deed to Hirst in which it was recited that it was in trust for all the bondholders. In April, 1860, in pursuance of the direction of three-fourths of the bondholders, Hirst conveyed to the West Penna. R. Co., organized by the purchasing bondholders to succeed the N. R. Co., "free and discharged from all and every trust whatever." The act incorporating the W. P. R. Co., recited that said company was composed of persons named, and "all others who hold mortgage bonds," but the preamble set out the deed to Hirst "in trust for all the bondholders who participated in the said purchase," and that it was desirable "to reimburse the said bondholders for their expenditure of money and labor." In 1889, the plaintiff, as surviving partner discovered among the assets of the firm, a N. R. Co. bond, which by its terms was convertible into stock, and brought *assumpsit* against the W. P. R. Co., to recover for their refusal to exchange said bond into stock of the W. P. R. Co. Plaintiff claimed that Hirst took as trustee for all the bondholders of the N. R. Co., and that the conveyance to the W. P. R. Co., was really with the agreement that said company assumed Hirst's duties as such trustee, and that the W. P. R. Co., was therefore bound to make the exchange demanded. *Held*, that it was clear, from a consideration of the foreclosure decree, the deeds to and from Hirst, the master's report and the act incorporating the W. P. R. Co., that the plaintiff had merely an option to participate in the new venture, by coming in within a reasonable time and sharing in the expenses and risk. Hirst's duty, notwithstanding general expressions in the deeds and the act of assembly, was to distribute stock to such bondholders as participated in the original purchase or subsequently exercised their option to come in, and the last chance to exercise such option was when the deed was made to the W. P. R. Co. clear of all trusts. *Landis v. West Pennsylvania R. Co.*, 133 Pa. St. 579.

Party Advancing Money to Take up Coupons—Validity of Arrangement With Mortgagor.—A private arrangement by a third party with the mortgagor, whereby such party advances money to pay the interest coupons of mortgage bonds which are subsequently presented and paid, to the effect that such transaction shall be treated as a purchase of the coupons by the party advancing the money, is not enforceable against bondholders. *Fidelity Ins. T. & S. D. Co. v. Western Pennsylvania & S. C. R. Co.*, 138 Pa. St. 494.

Overdue Coupons—Right to Preference in Payment.—Overdue coupons detached from bonds before sale which remain the property of the company which issued the bonds are not entitled to preference in payment in the hands of an assignee over the coupons sold by the company with the bonds, and subsequently falling due. *Wood v. Guarantee Trust & S. D. Co.*, 128 U. S. 416.

Right of Bondholder to be Made Party to Proceedings by Company to Dissolve Injunction.—Gen. St. Conn. § 887, provides that where a person not a party has an interest or title which a judgment will affect, the court, on application, shall make him a party. Section 1288 provides that any person interested in or affected by an injunction may appear and be heard with regard to granting or dissolving the same. *Held*, that a bondholder of a street railroad company, which has instituted proceedings to dissolve an injunction forbidding it to lay its tracks in a street, is not entitled to be made a party to such proceedings, it not appearing that he could introduce any new facts or principles, or that the company was not making a *bona fide* and adequate defense of its rights. *In re Ferris*, 56 Conn. 396.

Municipal Aid Bonds—Amendment of Charter so as to Provide for Payment from Proceeds Arising from Sale.—Under Gen. St. Ky. chap. 68, § 8, which reserves to the legislature power to amend or repeal any corporate charter granted by it, "provided that no amendment or repeal shall impair

other rights previously vested," the legislature has no power to amend the charter of a railroad corporation so as to direct that the proceeds arising from the lease or sale of the road shall, after paying the corporate debts, be applied in payment of municipal bonds given in exchange for corporate stock issued to the municipality, since such application of the corporate funds would be unconstitutional, as interfering with the vested rights of the other stockholders. Such application of the corporate funds is not validated by the fact that the corporation has indorsed the bonds, since such indorsement does not make the corporation the principal debtor. *Hill v. Glasgow R. Co.*, 41 Fed.Rep. 610.

CAMPBELL

v.

PITTSBURGH & WESTERN R. CO.

(137 Pa. St. 575.)

Foreclosure of Mortgage—Liability of Purchasing Company—Construction of Decree.—A decree directing a judicial sale of the franchises, etc., of a railroad company provided: "Any purchaser * * * shall take * * * subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as well as, also, all unpaid claims of landowners for damages for property taken, injured, or destroyed, in the construction of the railroad." *Held*, that a judgment against the company, whose franchises were thus sold, before the sale, for wrongfully entering on plaintiff's land, and constructing its road, cannot be recovered in *assumpsit* against the purchasing company, especially, when after the judgment, and before the sale, the plaintiff had granted a right of way to the old company.

APPEAL from Clarion County Court of Common Pleas.

The case is sufficiently stated in the opinion of the court below.

"There is no controversy that the plaintiff in 1881 was owner of the land at the time the Pittsburgh, Bradford & Buffalo Railroad Company, the defendant's predecessor, was incorporated, on which such company entered, located, constructed, and operated a railroad. It does not appear the locating company, or the defendant succeeding to its rights, made any effort to gain the plaintiff's consent for entry on her land, or that any bond for the damage was tendered, filed, or approved by the court, as provided by law. It appears also that some time prior to January 1, 1884, the road, stock, and franchises of the Pittsburgh, Bradford & Buffalo Railroad Company were transferred to and vested in the Pittsburgh & Western Railroad Company; that thereafter this last mentioned company took possession of and operated the railroad, so constructed on plaintiff's land, up to June 8, 1887. August 5, 1886, the plaintiff brought an action of trespass against the Pitts-

burg & Western Railroad Company, (No. 376, of August term 1886,) to recover damages sustained by such construction and operation of a railroad on her lands. Judgment was recovered in this action before arbitrators, and no appeal ever taken. *

* * April 23, 1887, a decree of sale was made by the circuit court of the United States for the western district of Pennsylvania, in a proceeding in equity, wherein the Mercantile Trust Company was plaintiff, and the Pittsburgh & Western Railroad Company defendant. A commissioner was appointed by such court to make the sale, subject to certain specific conditions, among which were the following: "Any purchaser claiming under any sales made under this decree shall take and hold the railroad or railroads, or any part thereof, sold under and in pursuance hereof, subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as well as also all unpaid claims of land-owners for damages for property taken, injured, or destroyed in the construction of the railroad or railroads, or any part thereof, or of any of the works appurtenant thereto or connected therewith, whether or not the said defendant company, or any of the constituent companies aforesaid, have secured to such claimants the payment of such damages by giving or filing its bond or bonds, with surety, as provided by law; the purchaser or purchasers hereunder, or parties claiming by, through, or under them, assuming by such purchase the payment of such claims aforesaid." "

John W. Reed and Harry R. Wilson, attorneys for plaintiff.
W. H. Ross and W. L. & Don C. Corbett, attorneys for defendant.

MITCHELL, J.—The plaintiff's statement is defective in not exhibiting the full record of the suit in the circuit court of the United States, on which the right to recover against the present defendant depends. The procedure act of 1887, in express terms, requires the statement to be accompanied by copies of all notes, contracts, etc., and the excepted cases where "particular reference" to records is sufficient are confined to records in the county where suit is brought. The importance of such copies is well exemplified in the present case. The decree of the circuit court requires the purchaser at the sale to take subject to "all unpaid purchase money for any of the lands or rights of way herein referred to." What are so referred to, we can only conjecture. For all that appears in the statement, they may be specially described lands and rights of way, of which plaintiff's is not one.

But, irrespective of the incompleteness of the statement, it

discloses no cause of action. The claim is made against one corporation, on a judgment against another. What is the basis of liability? Not a lien on land, for as to the particular land in question it was and is the plaintiff's own, and the Pittsburgh & Western Railroad Company had no title on which a lien could fasten; and as to any other land of the Pittsburgh & Western Railroad Company, which the judgment might have grasped, the lien was discharged by the sale. It is plain, therefore, that the present defendant is only liable, if at all, by the decree of the circuit court, and the terms of the sale under which its title accrued. It is not necessary to discuss the authority of the circuit court to impose the terms it did as to the sale. The purchaser, and those in privity with him, are in no position to question the terms which they agreed to when they bought. But the decree was out of the usual course of judicial sale, and in derogation of the general principle that purchasers at such sales take the land discharged, or subject only to such known and ascertainable liens as are expressly preserved. We must therefore examine the decree to see that its effect is not pushed beyond its intended limits.

No cause of action—Purchasing company not liable.

The language is: "Any purchaser * * * shall take * * * subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as well as also all unpaid claims of landowners for damages for property taken; injured, or destroyed in the construction of the railroad," etc. All that is included in the language is what is commonly known as "land damages," to-wit, compensation to the owners of the land over or along which the railroad is constructed for the injury to their land by such construction, and the right of action is given in the words of the constitution to all owners of land, for "property taken, injured, or destroyed by the construction." Such damages form a well known class, having certain features peculiar to themselves, such as express protection by name in the constitution, exemption from ordinary statutes of limitation, etc. This is the class of claims which the decree imposes upon the purchaser. It is not said that he shall take subject to the debts or judgments of the old company generally, as for goods furnished or services rendered, or for negligence or trespasses, but only for the particular class of obligations clearly indicated. The claim of the plaintiff is for a debt of the old company on a general judgment for damages by trespass. It is on the same legal footing as to the purchaser, the present defendant, as a judgment for damages for burning plaintiff's barn, or running over his cattle. It is not in any legal sense for land taken, or right of way acquired. The purchaser's claim for compensation in

that regard was the same after this judgment as before. It is this feature which distinguishes the present case from *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290, and *Buffalo, N. Y. & P. R. Co. v. Harvey*, 107 Pa. St. 319, 26 Am. & Eng. R. Cas. 642. Those were cases of damages for land taken in the construction of the railroad, and in the former the charter of the defendant expressly made such damages a perpetual lien until paid. We are therefore of opinion that the claim of plaintiff belongs to the class of general debts of the Pittsburgh & Western Railroad Company which were not covered by the terms of the decree of the circuit court, and for which the defendant is not liable. Even if this conclusion were doubtful upon the terms of the decree, (which we do not regard it,) it would be made clear by the fact set forth in the affidavit of defense that the plaintiff granted the right of way to the Pittsburgh & Western Railroad Company after the judgment for the trespass, and before the sale. It is true the agreement did not, so far as appears here, release the damages for the previous trespass of the defendant in the judgment. That claim still remained good against the trespasser. But it severed the past trespass from the future lawful occupation, and gave the old company an unquestionable title to a right of way, to which the purchaser succeeded. At the time of the sale, therefore, the plaintiff had no claim for any "unpaid purchase money, or right of way," and no right of action to which the purchaser became subject. Judgment reversed.

Liability of Purchaser at Foreclosure Sale to Compensate Landowner.—See *Rio Grande & E. P. R. Co. v. Ortiz* (Tex.), 44 Am. & Eng. R. Cas. 67, note 72^a.

FRANK, *et al.*

v.

NEW YORK, LAKE ERIE & WESTERN R. CO.

(122 *New York*, 197.)

Possession of Leasehold Premises by Company Purchasing at Foreclosure Sale—Presumption of Law—Payment of Rent.—Where a person, other than the lessee, is shown to be in possession of leasehold premises, the law presumes that the lease has been assigned to him by a sufficient instrument; but there is no presumption that the person in possession has entered into any express covenant to pay rent, so as to make himself liable through privity of contract or otherwise than through privity of estate. But the party in possession is legally and equitably chargeable with the payment of the rent reserved for such time as he continues to occupy the property. These principles applied when a railroad was sold under foreclosure, and

a new corporation acquired all its property except a leased line which was not included in the property transferred, but which the new company took possession of and operated. The new company is regarded as the assignee of the lease and liable for the rent which the original lessee had agreed to pay, and which was, in this case, the interest on the bonds of the leased line.

Same—Agreement of Purchasing Company with Lessor—Rights of Bondholders.—The mortgage bondholders of a railroad company which has been leased to another company have no lien upon the rents under such lease until they elect to take possession, or move for a receiver; the rents belong to the lessor company who may contract as it chooses with the assignee of the lease. Accordingly, where a railroad company takes possession of a line of road leased to a company whose property it has acquired under a foreclosure sale, and continues to operate the leased road under an agreement made between it, the lessor, and the lessee, to the effect that it should not thereafter pay the interest upon the bonds of the lessor company which constituted the rent, so long as this agreement remained in force, the company making the agreement is relieved from liability to make such payment.

APPEAL by both parties from a judgment of the general term of the supreme court in the fifth judicial department, modifying a judgment entered upon the decision of the court at special term. Action to foreclose a trust deed in the nature of a mortgage executed by a railroad company to secure the payment of its bonds. Certain railroad corporations, organized severally under the names of the Erie & Genesee Valley Railroad Company, the Erie Railroad Company, and the New York, Lake Erie & Western Railroad Company, are herein referred to, respectively, as the Genesee Valley Company, the Erie Company, and the appellant company. The mortgage sought to be foreclosed was executed June 20, 1871, by the Genesee Valley Company to the plaintiffs and one Lockwood, as trustees for the bondholders, to secure the payment of certain bonds, concurrently issued, to the amount of \$120,000 of principal, due July 1, 1886, and the interest coupons attached, due successively on the 1st days of January and July in each year. The mortgage provided that, if the interest on the bonds remained unpaid for six months, the whole amount of principal and interest should be due and payable, and the mortgagees might take possession. November 1, 1871, the Genesee Valley Company leased its road, and all the rights, powers, and privileges appurtenant thereto, to Lauren C. Woodruff for the unexpired term of its charter, which was for 100 years, and of any renewals thereof, the lessee "paying, or causing to be paid, therefor the bonded debt of \$120,000, whenever the same shall become due, * * * and also all lawful taxes * * * and assessments; * * * in case of payment of the bonds by the party of the first part, (Woodruff,) or the Erie Railway Company, thereafter the annual rent to be one dollar, and taxes." The lessee

expressly covenanted, among other things, to operate the road as a first-class railroad; to pay the interest on the bonded debt, and, upon its maturity, to pay the principal, or provide for a renewal of the loan; to complete the road from Dansville to a connection with the Erie Railway; to keep it and its appurtenances in repair; to indemnify the lessor against all suits, damages, and costs; and, upon the expiration or other sooner determination of the term granted, to surrender the demised property in as good condition as when received, ordinary wear and use excepted. The various covenants were made binding upon the successors and assigns of the respective parties. November 8, 1871, said Woodruff leased the same property to the Erie Company by an instrument containing substantially the same covenants and conditions. February 4, 1874, the Erie Company, being then in possession of the railroad and property covered by said leases, executed a mortgage thereon, as well as upon other property, to the Farmers' Loan & Trust Company to secure the payment of bonds to the amount of \$40,000,000. The interest coupons outstanding against the Genesee Valley Company up to and including those falling due January 1, 1875, were paid by the Erie Company, which shortly after that date became embarrassed, and thenceforward failed to comply with that condition of its lease which required payment of interest. In May, 1875, the people, through the attorney general, commenced an action to dissolve the corporation; and, on the 26th of that month, Hugh J. Jewett, who was then the president of the Erie Company, was appointed receiver of its property and franchises, and took possession of the same, including the property covered by the lease from Woodruff. In June, 1875, the Farmers' Loan & Trust Company commenced an action to foreclose its said mortgage; and, on the 15th of the same month, said Jewett was appointed receiver in that action also. From May, 1875, until April, 1878, when the Erie Company was reorganized, the railroad of the Genesee Valley Company was operated as a part of the Erie system of railroads by said receiver, who took and retained the receipts and profits, all of which he was authorized to do by orders of the court which appointed him. In like manner, he was further authorized, in his discretion, to pay rent due and to become due upon the leases held by the Erie Company, "in manner and form as provided in such leases respectively;" but he was not required, as the court further said in its order, to adopt and confirm any such leases that, upon due inquiry, he should find not to be advantageous to all parties in interest. November 7, 1877, a decree was made foreclosing the mortgage to the Farmers' Loan & Trust Com-

pany, which, after reciting, among other things, that some of the leasehold interests covered by said mortgage are "burdensome, unprofitable, and worthless," adjudged that the property "mortgaged or intended so to be" should be sold by a referee in one parcel, subject to all liens prior to the date of the mortgage, but that the plaintiff should "be at liberty to abandon and disclaim, at any time before the sale, any leasehold estates or interests, embraced or included in the mortgage, not deemed to be valuable, by giving notice of such abandonment and disclaimer to the referee in writing; and the referee shall not expose for sale the leasehold estates and interests so abandoned and disclaimed as part of the mortgaged premises." The decree further provided that all leasehold estates and interest sold by the referee as part of the mortgaged property should be sold subject to the terms and provisions of the leases and contracts under which they were held. The referee was authorized to do all things needful and proper, and take all measures deemed judicious and necessary to expose the property for sale in such a manner as to command the highest price. The receiver was directed to assign to the purchasers of the mortgaged premises, upon their request, all executory contracts of the Erie Company; but such purchasers, as the decree further provided, should "not be required to assume any contracts of the defendant company entered into before the appointment of the receiver, and all such contracts not so assumed by such purchaser * * * shall be reassigned by the receiver to the said defendant company." It was further adjudged that, if a purchase should be made under the reorganization act, (Laws, 1874, chap. 430,) the purchaser should take title subject to all the lawful provisions of the plan and agreement of reorganization, and that he should be fully vested with the property and premises sold in pursuance of the judgment. The property "authorized to be sold" under the decree included "terms and remainders of terms, franchises, * * * leasehold estates, contracts, and other property." The notice of sale contained the same description as the decree; but the terms of sale, which were publicly read before the property was sold, excluded "such portions thereof as will be declared excepted at the time and place of sale." The plan of reorganization, entered into July 21, 1876, was approved by the court, August 12, 1876. It provided for the "foreclosure of the property of the company," and that, "if the railway is bought in after such foreclosure, a new company shall be formed to hold and work it."

The referee, in his report of sale, states that, at and prior to the sale, due and public announcement was made by him

that the lease between Woodruff and the Genesee Valley Company, or the estate or interest purporting to be created thereby, would not be included in the property sold. The sale took place April 24, 1878; and the next day it was duly confirmed by the court, which directed the referee to forthwith execute a proper deed of conveyance to the purchasers, who were the reconstruction trustees, of all the property "so, as aforesaid, sold or intended so to be." The referee's deed conveys the property described in the decree, "except, however, as follows: * * * (4) A memorandum of agreement, or lease, dated November 8, 1871, between the Erie Railway Company, of the first part, and Lauren C. Woodruff, lessee of the Erie & Genesee Valley Railroad Company of the second part." The grantees covenanted to assume and save the receiver harmless from his contracts, obligations, and lawful indebtedness. April 27, 1878, the purchasing trustees conveyed to the appellant company, which was organized on that day, the same property, by a deed containing the same exceptions as the deed from the referee. The certificate of incorporation of the appellant company recites the foreclosure proceedings, but expressly states that the Woodruff lease was excepted from the property sold. May 3, 1878, said receiver presented to the court his petition, wherein, after reciting the proceedings had in the foreclosure action, he stated that, in pursuance of the judgment therein, "all and singular the mortgaged premises were sold as therein directed," and that the referee executed and delivered a deed "conveying the premises and every part thereof" to the purchasers; that the purchasers conveyed to the appellant company "all and singular the said premises so, as aforesaid, conveyed to them;" but the petition also refers to the several deeds on record as a part thereof, and, as already stated, each deed expressly excepts the Woodruff lease. The petition further states that the appellant company claims to be entitled to receive from him, as receiver, "the possession of all the property and franchises embraced in the said judgment, and the several deeds of conveyance." The petitioner asks for authority to transfer, surrender, and deliver to the appellant company "all the property and franchises in his hands, and under his control as receiver," with certain immaterial exceptions. On the same day, an order was made by the court directing him to transfer, deliver, and surrender to said company "all the property and franchises whereof he is now possessed as receiver * * * and which were embraced or intended to be embraced in the judgment of foreclosure herein." June 1, 1878, the appellant company gave the receiver a receipt for "all the property mentioned as being in judgment, and enumerated in

the referee's report of sale thereunder." July 18, 1878, the receiver transferred to the appellant company a large number of contracts and agreements formerly belonging to the Erie Company, but not including the Woodruff lease. It was stated in the instrument of transfer that the purchasers under the foreclosure and their successors, the appellant company, had assumed the executory contracts so assigned. July 26, 1878, the receiver reassigned to the Erie Company the Woodruff lease, among other instruments, by a writing which recited his power to do so, as conferred by the judgment in the foreclosure action, in case the purchasers at the mortgage sale should refuse to assume them, and stated that such purchasers had not assumed them, but had rejected and refused to assume them. December 4, 1879, the receiver executed and delivered to the appellant company an instrument which, after reciting the application and order of May 3, 1878, stated that on the 1st day of June, 1878, he "formally transferred and surrendered to your company the property of the Erie Railway Company," excepting such as he had retained to satisfy his outstanding indebtedness as receiver. He further stated in said instrument as follows: "I now propose to, and herewith do, transfer and surrender to your company all of the property of the Erie Railway Company, real and personal, remaining in my hands as receiver, not heretofore transferred and surrendered to you as above recited, in order that you may become completely possessed of all the property of the Erie Railway Company, which was sold under foreclosure, and which became vested in you by such sale and subsequent conveyances and assignments above referred to." November 25, 1879, final judgment was entered in the action brought by the people, dissolving the corporation, and adjudging that, "by reason of the said foreclosure and sale, the said Erie Railway Company has been wholly and permanently deprived of every right and franchise, and of every kind and character of property necessary to enable it to carry on business, and to exercise and employ its franchises, as contemplated and required by the laws under which said company was created." December 30, 1879, various reports of the foregoing transactions, among others, were confirmed by the court, and the receiver was discharged from all liability to and including December 3, 1879.

The railroad of the Genesee Valley Company has been held and operated as follows: From November 8, 1871, to May 28, 1875, by the Erie Company; from the latter date to June 1, 1878, by Mr. Jewett, as receiver; and from that time onward, so far as appears, by the appellant company. May 14, 1879, the appellant company, of which Mr. Jewett was presi-

dent from its organization, served a notice upon the Genesee Valley Company, and upon Lauren C. Woodruff, stating that the Erie Company came into possession of the road under an agreement with Woodruff, and, although extensive and permanent improvements were made, it was operated at a loss; that he, as receiver, also operated it at a loss, having been advised that the lease was void, to which Mr. Woodruff had assented, but on account of public and other considerations he did not abandon it; that "he did not expect that the operation of the road at a loss, solely for the benefit of that part of the public which it accommodated, would, in addition to his loss, expose him to a claim for rental;" that the appellant company "acquired no interest in this property, but merely succeeded to the possession of the receiver;" that the appellant company was no longer willing to continue the operation of the road at a loss, and therefore gave notice that it would cease to operate the road on July 1, 1879. June 30, 1879, said Woodruff made a written proposition to the appellant company to the effect that it should continue to operate the road in question after July 1, 1879, until further notice, and to pay the expenses of running it, but that it should not "be compelled to pay any rent for the use of the same." No obligation was to be implied from the execution of such proposal, which was not to be so construed as to affect any of the legal rights of the parties thereto "as the same shall exist on and after July 1, 1879." This proposition was presented to the directors of the Genesee Valley Company, who on July 5, 1879, declared by resolution that their company desired "to have its road operated in the future, as in the past, for the benefit of the citizens of the territory through which it runs, and that it will assent to any arrangement made by Mr. Woodruff, having that end in view, that will not conflict with or change the rights or obligations of Mr. Woodruff and this company under the contract between them bearing date November 1, 1871." They directed that a copy of this resolution, with its preamble embracing the opinion of their counsel upon the subject, should be attached to said proposal, and returned to the appellant company, which on the 8th of July, 1879, notified the Genesee Valley Company and said Woodruff that it would continue to operate the road during the month of July, upon the terms mentioned in said proposal, but that, unless some permanent arrangement were made by August 1st, it would withdraw its trains from the road. July 30th said Woodruff agreed in writing with the appellant company that if it would not withdraw its trains on the 1st of August, but would continue to operate the road until the 1st of September, it should have the right to do so "free of any

rental or obligation for the use of said road during said month of August." January 24, 1880, this agreement was continued in force from September 1, 1879, until May 15, 1880, and by two subsequent agreements said arrangement was continued until May 15, 1881. August 25, 1879, a resolution was adopted by the board of directors of the Genesee Valley Company, appointing a committee to confer with Mr. Woodruff with reference to a final settlement of the difficulties, and in the meantime requesting the appellant company to continue the operation of the road "as heretofore operated without liability to this company for its use, until such conference can be had and a settlement or compromise effected."

This action was commenced October 25, 1877, but, by order of the court, a supplemental summons was issued March 10, 1883, bringing in said Woodruff and the appellant company as parties defendant. Upon the trial, the special term by its decree, made as of October 1, 1885, adjudged that the sum of \$235,605 of principal and interest was due upon the mortgage in question, and directed the usual foreclosure and sale, with judgment for any deficiency, collectible by execution out of the property of the following defendants, in the order named: (1) The appellant company; (2) Lauren C. Woodruff; (3) the Genesee Valley Company. Upon appeal, the general term modified the decree "so as to limit the liability" of the appellant company "to a sum equal to the amount of interest upon the bonds of the" Genesee Valley Company, "from the 1st day of January, 1875, to the 1st day of July 1879, with interest on the several installments from the time they became due, respectively, amounting" on July 1, 1887, the date of entering judgment, to \$81,425. This was declared to be without prejudice to the right of any party entitled thereto to require the appellant company to account for and pay any such rent as it might be liable to pay on account of the possession and operation of the road after July 1, 1879. December 10, 1889, the parties stipulated that when the appellant company or the said receiver should deposit, to the credit of the plaintiffs, "\$37,882.45, the amount decreed in the action of Lauren C. Woodruff v. Hugh J. Jewett as receiver, * * * being the amount due and unpaid of "the interest coupons in question from January 1, 1875, to January 1, 1878, and should pay certain costs, "such payments to be proved by the affidavit of Hon. E. C. Sprague, * * * such affidavit may be annexed to the record in this case, * * * with the like force and effect as if a supplemental answer had been interposed, and a final decision of the court made to the effect that such payments had been made." The affidavit of Mr. Sprague, dated February 26, 1890, that the

deposit had been made as required by said stipulation, is annexed to the appeal-book.

James C. Carter and *James Wood*, for plaintiffs.

Lucius N. Bangs, for *Lauren C. Woodruff*.

J. A. Vanderlip, for *Erie & G. V. R. Co.*

E. C. Sprague, for *New York, L. E. & W. R. Co.*

VANN, J.—By the agreement entered into November 1, 1871, between the Genesee Valley Company and *Lauren C. Woodruff*, a leasehold estate was carved out of the fee belonging to the former; and the consideration agreed to be paid therefor by the latter was the rent reserved, although in an unusual form. *Woodruff v. Erie R. Co.*, 93 N. Y. 609, 615, 16 Am. & Eng. R. Cas. 501; *People v. O'Brien*, 111 N. Y. 1. As the lease from *Woodruff* to the Erie Company embraced all that he had acquired from his lessor, it operated as an assignment in fact, although not such in form, of the entire term granted by the original lease. *Stewart v. Long Island R. Co.*, 102 N. Y. 601. Thenceforward the legal relations of the three parties named were those of lessor, lessee, and assignee under a lease. The Erie Company became liable for the interest and principal, as it fell due, both by privity of contract and by privity of estate. *Wood, Landl. & Ten.* 742; *Gear, Landl. & Ten.* §§ 125, 126. The former liability depended upon its express promise to pay, whether it entered into possession or not, and could be discharged only by payment, while the latter depended upon entry into possession under the lease, and could be avoided by assigning the entire term and relinquishing possession.

Liability of
receiver in
possession.

When the receiver of the Erie Company took possession, and operated the railroad, he also became liable, in effect, as assignee during the period of his occupation. The foundation and nature of his liability were defined by this court when it said that "he could not take possession of the property, and enjoy its use and occupation, without incurring a liability for the payment of the rent under the lease by which his predecessor secured its possession. The principles which govern the liability of an assignee of a lease seem to be applicable to the case of a receiver, and he would be equitably and legally chargeable with the payment of rent under a lease for such time as he continued to occupy the property demised." *Woodruff v. Erie R. Co.*, *supra*, 624. The next and last possessor of the leasehold estate was the appellant company, and the origin, nature, and effect of its possession present the chief points of controversy on this appeal. It is clear that the lease was neither destroyed

Entry of ap-
pellant into
possession.

nor affected by the foreclosure of the mortgage held by the Farmers' Loan & Trust Company, nor by the action brought to dissolve the Erie Company, because all of the contracting parties were not before the court in either of those actions, and the decree was made subject to all prior liens. The leasehold estate, therefore, was still in existence, unimpaired, when the appellant company entered into possession of the property. By what authority and in what capacity did it make that entry?

The claim of the plaintiffs that it entered as assignee in fact, because the judgment of foreclosure and the referee's deed thereunder actually transferred the lease, does not appear to be well founded. The mortgage foreclosed doubtless covered the interest of the Erie Company in the lease, and the judgment authorized its sale as a part of the property embraced by the foreclosure, but it also authorized the plaintiffs therein to abandon and disclaim their lien upon any of the 19 leases not regarded as valuable, by notifying the referee to that effect before the sale. Thereupon, as the decree provided, that officer was required not to expose the leasehold estate so abandoned for sale as part of the mortgaged premises. No reason is perceived why a creditor has not the right to waive or release a part of his security; but, if there is any question as to this, because, in the case under consideration, the debtor did not ask for it, it cannot be raised collaterally. The remedy must be sought in the suit in which the judgment was rendered, as even third persons who claim rights under the judgment are bound by the provisions affecting those rights. It does not appear expressly whether the requisite notice was given or not. It appears, however, by the referee's report of sale that the lease in question was not embraced in the property sold, and that he publicly announced before the sale that neither the Woodruff lease nor the estate created thereby would be included in the sale. The terms of sale corresponded with this announcement. The report of the referee was confirmed, and his conveyance, made under the direction of the court, expressly and specifically excepted from the effect of the sale the lease in question. The deed from the purchasing trustees contained the same exception, and the receipt of the appellant company was for the property enumerated in the referee's report of sale. Under these circumstances, and those relating to the subject more fully detailed elsewhere, we think that the presumption arises that the notice had been given. When an officer of the court does an act "which would be a violation of his duty unless a certain condition had first been performed, it will be pre-

Lease did not
pass by fore-
closure sale.

sumed that such condition was performed." *Davis v. Bowe*, 118 N. Y. 55, 60. Moreover, independent of this presumption, the evidence shows an unmistakable intention on the part of the court, its officer, and the grantees, that the lease which created, defined, and, in a certain sense, constituted the leasehold estate, should be excepted from the transfer. While the appellant company was the successor of the Erie Company, still, as to the ownership of the property sold under the mortgage at least, it was a new corporation. This plainly appears from the title, the text, and object of the statutes under which the reorganization was effected. Laws 1876, chap. 446, § 1; Laws 1874, chap. 430; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176; *Hoard v. Chesapeake & O. R. Co.*, 123 U. S. 222. It acquired title, therefore, to no property of the old company by virtue of the foreclosure proceedings, except such as was actually transferred to it under the direction of the court. If it were true, as claimed by the plaintiffs, that all the property covered by the mortgage must be sold as an entirety, and that the purchaser must accept each and every part *cum onere*, a railroad corporation by making bad bargains after it had mortgaged its property could destroy the value of the mortgage.

The plaintiffs further contend that said lease was transferred to the appellant company by the receiver under the powers conferred upon him by the special term, and that it accepted such transfer. Title to the lease was vested in the receiver by virtue of his appointment, and it may be that the new company was willing to accept the naked title from him without any covenant to assume the burdens thereof, when it was unwilling to accept title under the foreclosure sale, and assume performance of all the covenants, as required by the judgment. Certain acts of the appellant company and of the receiver are difficult to explain upon any other theory. In his petition of May 3, 1878, that officer asked for authority "to transfer, surrender, and deliver" to the appellant company "all the property and franchises in his hands and under his control as receiver," subject to certain exceptions, not now material. The order made was as broad as the prayer of the petition, and each was broad enough to cover the lease, which was still held by the receiver. Yet the transfer, made July 18, 1878, of various executory contracts, did not include the lease. That transfer, however, does not allude to said order, but purports to have been made pursuant to the judgment of foreclosure, and it required the purchasers to assume the burdens. No transfer depending on said order for authority appears to have been made until December 4, 1879, when the receiver, by an as-

Lease not
transferred
by receiver.

signment of that date, transferred to the appellant company "all the property of the Erie Railway Co., real and personal, remaining in my possession, not heretofore transferred and surrendered to you, as above recited, in order that you may become completely possessed of all the property of the Erie Railway Co., which was sold under foreclosure, and which became vested in you by such sale, and the subsequent conveyances and assignments, above referred to." It does not appear whether any transfer other than those mentioned was made or not, except under certain proceedings in the courts of the state of New Jersey, which affected the property in that state only, and did not include the lease in question. The assignment of July 26, 1878, to the Erie Company is not regarded as important, for the effect of a conveyance to a dying corporation, made by its own receiver in anticipation of its dissolution, is not apparent.

The appellant company, right after its organization, entered into possession of the property covered by the lease, and it has remained in possession and has operated the railroad ever since, yet it failed to show upon the trial in what capacity it entered, or by what authority it operated the road. The theory of the plaintiffs as to transfer by the receiver finds some support in the entry into possession by the appellant company. It cannot be heard to say that it entered as a trespasser, for that would be asserting its own wrongful act as a defense to the claim of one who had the right to waive the tortious element, if it existed, and to insist upon the entry as valid, with all the consequences that may be implied therefrom. *Schuyler v. Smith*, 51 N. Y. 309; *Conway v. Starkweather*, 1 Denio (N. Y.), 113. The law presumes, under the circumstances, that it entered rightfully; and, as it failed to show any other authority, may not the act of entry be regarded as a practical construction of the order of May 3, 1878, and the subsequent action of the receiver? At all events, it entered into possession in subordination to the lease, for in no other way could it have entered except as a trespasser. As long as the leasehold estate was in existence, no person or body corporate could give it authority to enter except upon the lease. What presumption arises from the fact of possession and occupation under these circumstances? Where a person other than the lessee is shown to be in possession of leasehold premises, the law presumes that the lease has been assigned to him. *Williams v. Woodard*, 2 Wend. (N. Y.), 487, 493; *Acker v. Witherell*, 4 Hill (N. Y.), 112, 116; *Carter v. Hammett*, 12 Barb. (N. Y.), 253, 18 Barb. (N. Y.), 608; *Cross v. Upson*, 17 Wis. 618; 1 Washb. Real Prop. 509; Tayl. Landl.

Entry by appellant—Presumption of assignment of lease.

& Ten. § 450; 2 Phil. Ev. 150; Woodf. Landl. & Ten. 276. It further presumes that the assignment was sufficient to transfer the term, and to satisfy the statute of frauds. *Bedford v. Terhune*, 30 N. Y. 453. It does not, however, presume that the assignee entered into any express covenant to pay rent, so as to make himself liable through privity of contract, or otherwise than through privity of estate. The appellant company, therefore, under the facts proved became *prima facie* liable as assignee of the lease during the period that it operated the road. This involved the obligation to perform all covenants running with the land that were broken during said period, including the covenant to pay rent or that which stood in the place of rent. The presumption that a party, other than the lessee, who is found in possession of leased premises, holds them under an assignment of the lease, may be rebutted by showing that he was in as an under tenant. *Armstrong v. Wheeler*, 9 Cow. (N. Y.), 88; *Carter v. Hammett*, 12 Barb. (N. Y.), 153. It is claimed that the supposed assignee may rebut this presumption by proving that he never had any assignment, and there is authority for the position. *Quackenboss v. Clarke*, 12 Wend. (N. Y.), 555; *Welsch v. Schuyler*, 6 Daly (N. Y.), 412. This, we think, is open to question, provided proof of that fact involves proof of entry without right or as a trespasser; but it is not necessary to so decide in this case, as the appellant company failed to show that it never had an assignment of the lease in question. Proof that it did not take title in a certain way, as under the foreclosure proceedings, is no proof that it did not take title at all. No effort was made to show that the documents read in evidence were the only papers in existence relating to the subject. The receiver was not called to testify that he never executed and delivered to the appellant company any instrument purporting to be an assignment of or relating to the lease other than those in evidence. No officer of the company was asked whether he knew of any such paper. There was a failure to meet the burden of proof resting upon the putative assignee in this regard, and hence the presumption arising from possession ripened into a fact. The appellant company, therefore, is to be regarded as assignee of the lease during the time that it has occupied the leasehold estate, and as such liable for the rent accruing subsequent to the date of entry, at least until the new arrangement was made, which is alleged to have relieved it from further liability to pay rent as stipulated in the lease.

The appellant company operated the railroad covered by the lease without complaint or question until May 14, 1879,

when it notified the original lessor and lessee, the latter being at the time one of the two mortgagees then surviving, that it was operating the road at a loss, and that it would cease to operate it on the 1st of July following. Appended to this was a notice signed "Erie Railway Company, by H. J. Jewett, President and Receiver," that "on behalf of the Erie Railway Co., and on behalf of myself as receiver of that company, all rights to compensation for improvements and additions, and all rights of reclamation for losses, are hereby reserved." Negotiations followed, which resulted in an arrangement between the Genesee Valley Company, Lauren C. Woodruff, and the appellant company by which the last named, at the request of the others, agreed to continue the operation of the road at his own expense for the public benefit, provided it should not "be compelled to pay any rent for the use of the same." The mortgagees, through Woodruff, had notice of these negotiations, and of the result thereof, but they made no objections and did not attempt to take possession of the road, although they had the right to do so. What was the effect of this arrangement? As we have held, the appellant company was at the time in possession as naked assignee, with no express promise on its part to pay rent. This is equally true, whether its title rests upon an assignment presumed, but not, otherwise proved, or upon the order of May 3, 1878, as neither source of title required anything but a bare operative transfer. It was therefore liable only in respect of its possession, and for such covenants only as might be broken while privity of estate continued. It was in its power to escape this liability at any time by assigning the lease and abandoning possession, even if it were done for the express purpose of avoiding the further payment of rent. *Childs v. Clark*, 3 Barb. Ch. (N. Y.), 52; *Tate v. McCormick*, 23 Hun (N. Y.), 218; *Durand v. Curtis*, 57 N. Y. 7; 2 Platt, Leases, 416. Privity of estate would thus be destroyed, and with it the foundation of future liability.

Agreement of
lessor, lessee
and assignee.

It is clear that ordinarily the lessor, lessee, and assignee of a lease may modify its terms by reducing the amount of rent. Can they do so when there is a mortgage upon the property covered by the lease, but not upon the leasehold estate itself? Why can they not, in the absence of fraud, and when, as in this case, there is no covenant on the part of the assignee for the benefit of the mortgagee? Without such a covenant, or some express promise, the assignee of a lease is under no more obligation to the mortgagee of a lessor than a grantee is to the mortgagee of a grantor. *Vrooman v. Turner*, 69 N. Y. 280, 283;

Same—Rights
of mortga-
gees.

Pardee v. Treat, 82 N. Y. 385; *Root v. Wright*, 84 N. Y. 72; *Seward v. Huntington*, 94 N. Y. 104. A mortgagee out of possession has no lien upon rents. Until he elects to take possession, or moves for a receiver, the rents belong to the lessor, who may contract as he chooses with the assignee in regard to them. *Argall v. Pitts*, 78 N. Y. 239; *Rider v. Bagley*, 84 N. Y. 461; *Wyckoff v. Scofield*, 98 N. Y. 475. When the mortgagee takes possession he does so subject to all arrangements made in good faith between a lessor, lessee, and assignee for the relief of the latter, unless there was an express promise by him inuring to the mortgagee's benefit. The fact that rent is payable as interest on a mortgage does not affect the liability of an assignee, except while privity of estate continues. When the appellant company was about to abandon possession of the road, and extinguish the privity of estate, it was induced not to do so by the arrangement under consideration. How long that arrangement continued does not appear, but we think that so long as it remained in force it effectually reduced the amount of rent payable by the appellant company as assignee in possession. The judgment of the general term should be modified by deducting therefrom the amount deposited in the Metropolitan Trust Company of New York under the stipulation of December 10, 1889, and, as modified, affirmed, without costs in this court to any party. All concur, except BRADLEY and HAIGHT, JJ., not sitting.

CENTRAL TRUST CO.

v.

FLORIDA R. & NAVIGATION CO., (HAWKINS, Intervenor.)

(*U. S. Circuit Court, N. D. Florida, August, 1890, 43 Fed. Rep. 751*).

Mortgage—Guaranty of Bonds by State—Validity of Decree.—A decree that a certain branch of a railroad is not subject to the lien of a mortgage to secure bonds which have been guarantied by the state, is of no validity, where it is shown that such decree was made in a suit in which the bondholders were not represented, of which the state has not been notified, and which was brought in a county in which no part of the branch was situated.

Foreclosure Sale—Notice of Adverse Claim—Purchaser's Title.—The title of a purchaser at a foreclosure sale of a railroad is not affected by notice of an adverse claim under an invalid decree.

IN EQUITY.

SPEER, J.—This is an intervention in a bill where the complainants are trustees under deeds of trust made to secure a large amount of bonds issued on the railroad of the defendant company, to-wit, the Florida Railway & Navigation Company. This company was incorporated under a general act of the legislature of the state of Florida. It issued six million of bonds, with the deed of trust above mentioned to the Central Trust Company of New York. By the bill, in which the intervention before the court is presented, there was obtained a decree and a judicial sale of the entire line from Chattahoochee to Jacksonville. There were also sold the branch roads to St. Marks and Monticello. Upon the last—a short road—this controversy depends,—the road from Fernandina to Cedar Keys and Waldo to Wildwood, and afterwards built to Plant City, with extension to Tavares, upon which there was an issue of underlying bonds. The Florida Central & Western Railroad was also organized under a general act. They likewise issued bonds on 234 miles of railroad from Chattahoochee to Jacksonville, with branches to St. Marks, to Tallahassee, and Monticello to Drifton, 202 miles. Eight hundred and eight thousand dollars of the bonds—\$12,000 a mile—were issued in March, 1881, and a deed of trust to secure the payment of the same was made to the Guarantee Trust & Safe-Deposit Company. The Florida Central & Western Railroad was formed by a combination of the lines of two companies, which were subject to foreclosure and sold, as appears in the case of Schutte against the railroad company and others; the decree having been rendered on May 31, 1879, and the sale having been made in 1881. The roads were as follows: (1) The Florida Central Railroad Company, 60 miles, from Jacksonville to Lake City; (2) the Jacksonville, Pensacola & Mobile Railroad Company, Lake City to Chattahoochee, with the branches above mentioned. There was also an issue of bonds to the state of Florida for four millions of dollars for the benefit of the Florida Central Railroad Company. These bonds were issued in exchange of three million dollars of bonds of the latter company, and one million additional, which were issued under the acts of June, 1869, and January, 1870, (chapters 1716, 1731 of the Laws of Florida.) These bonds gave to the state of Florida a statutory lien upon the last-mentioned road. The bonds were issued on the 1st day of January, 1870. The Jacksonville, Pensacola & Mobile Railroad company was organized under a special act, and, being authorized so to do by the terms of the act, (chapters 1716 and 1731 of the Laws of Florida,) consolidated with its line other roads or parts of roads from Quincy to Lake City, from Tallahassee to St.

Marks, and the particular branch in controversy here, from Drifton to Monticello. These lines were owned by the Tallahassee Railroad Company. The lines were absorbed by the Jacksonville, Pensacola & Mobile Railroad Company under the authority just mentioned. The Tallahassee Railroad Company, by virtue of the act of June 24, 1869, (chapter 1718 of the Laws of Florida,) was an organization of the purchasers, who bought on the 20th of March, 1869, at a sale made by the trustees of the internal improvement fund of Florida, the Pensacola & Georgia Railroad and the Tallahassee Railroad. The Pensacola & Georgia Railroad Company was organized under a special enactment made in January, 1853, (see chapter 484 of the Laws of Florida, McClell. Dig. 1048.) It was authorized to build a railroad from the city of Pensacola to a point on the Georgia line. Its charter was amended December 15, 1855, (chapter 728, *Id.*) so as to conform to the act of January 6, 1855, which is generally known as the "Internal Improvement Act." By the same amendment certain branches were provided for, and amongst them a branch from Drifton to Monticello, four miles in length.

After the amendment to its charter referred to in the preceding paragraph, the Pensacola & Georgia Railroad Company accepted for itself the operative provisions of the internal improvement act. As a consequence this company became entitled to receive from the state on so much of its main lines, extension, and branches as conformed to the lines specified in § 4 of the improvement act the state aid and benefits derivable therefrom. These were indorsement by the state of its bonds, the guaranty of interest on the same, grants to alternate sections of state lands, exemption from taxation, and the personal exemption of its employes from the duty to serve on the militia, on the juries, and to work the roads. They were entitled to receive also alternate sections of such lands as might be thereafter granted by the general government. It was provided also that it should have the aids and benefits of these land grants on so much of the line as did not conform to the route indicated in the fourth section of the internal improvement act. In consideration of these benefits it assumed certain obligations to the state. These related to the character of road construction, of the application of the proceeds of their indorsed bonds as directed,—the payment to certain sinking funds. For all payments made by the internal improvement fund they were to turn over an equivalent amount of stock, the maps of their lines were to be deposited, and in further consideration of this performance on their part they became entitled to exclusive privileges from competition for 20 miles on either side of their lines of

railway. A more important consideration moving from them to the state for the vast franchises which were granted to them was this: The Pensacola & Georgia Railroad Company created, upon their acceptance of the provisions of the act, a mortgage on all its franchises, roadbeds, work-shops, iron, equipments and depots, so that, upon a failure of the company, to pay interest and the amount due to the sinking fund for 50 days, the trustees of the internal improvement fund could, by virtue of the mortgage or lien just referred to, seize and sell the property covered thereby. This result soon followed. The railroad company failed to comply with the conditions of their obligation, and the trustees of the internal improvement fund seized, advertised, and sold the assets above mentioned, under the provision of the act of March 30, 1869. They were purchased by one Dibble and his associates. The purchase included the entire road and the branch now in controversy, and was thereafter incorporated into the Tallahassee Railroad Company, and consolidated with the Jacksonville, Pensacola & Mobile Railroad. Having been mortgaged to the state of Florida under the statutory liens of June, 1869, and of January, 1870, it was sold for the satisfaction of the Schutte decree under the lien of said mortgage, and was incorporated into the Florida Central & Western Railroad Company in March 1880, and was bonded and consolidated into the Florida Railway & Navigation Company in March, 1884, and was again bonded. All of these changes of organization and title included the branch from Drifton to Monticello, it having passed under the operation of the several liens, and, in connection with the main line, at the sale of March 20, 1869. By a disreputable trick the purchasers got possession of the Pensacola & Georgia Railroad Company by paying a portion of the purchase money and by substituting a worthless check for the balance. They at once proceeded to cover the road and the branch in question with the lien of the state bonds of January 1, 1870. In subsequent litigation to collect the balance of the purchase money and to enforce the lien of the internal improvement bonds, the question was presented whether this branch road was covered by the lien of the trustees of the internal improvement fund, and it has been uniformly held in the affirmative. *Internal Imp. Fund v. Jacksonville, P. & M. R. Co.*, 16 Fla. 708; *Holland v. State*, 15 Fla. 456; *State v. Anderson*, 91 U. S. 669; *Florida Cent. R. Co. v. Schutte*, 103 U. S. 129, 3 Am. & Eng. R. Cas. 1; Decision of BRADLEY, justice of the fifth circuit court of the United States for Florida, in *Schutte v. Florida Cent. R. Co.*, 3 Woods (U. S.) 692, decided in May, 1879.

It is insisted upon the part of the defendant company that

their title to the branch road for the foregoing reasons is perfect. This is not only true, they insist, by correct construction of all the enactments and contracts in question, but also by, definite and final adjudications. They insist that, if it were an original question the court must hold that the Pensacola & Georgia Railroad Company was an indivisibility; that its franchises covered its branches as well as its main line; that by the acceptance of the internal improvement act it put all of its railroad, whether on the main line or in the branches, under the operation of the act, and that its subsequent seizure and sale by the trustees acting under that act because of the default of the company vested in the purchasers complete and perfect title; and they call attention to what seems indisputable, that the branch was sold with the main line under the statutory lien, and they insist that this concludes all second and junior incumbrances. For the intervenor it is insisted that the decree of the state court has adjudicated that the branch from Drifton to Monticello was not subject to the lien of the internal improvement bonds. The intervenor prays that the receiver be required to bid at a sale of the said branch road from Drifton to Monticello to the amount of its value, which shall be estimated by a master. The fund to be realized from this bidding he claims—*First*. Under the deed of trust from the Pensacola & Georgia Railroad Company, dated in 1860, conveying the lands and so forth to trustees, and providing for the issue of certain bonds, the same to be a first lien on the lands, and a second mortgage on the railroad, its franchises, etc. This deed of trust was recorded in Jefferson county, where this branch is wholly situate, in February, 1870. *Second*. By reason of a judgment under a code of practice then in force in Florida, which judgment was obtained in the circuit court of Leon county in a proceeding there pending between the trustees, who are now represented by the intervenor, and others on the one part, and the Jacksonville, Pensacola & Mobile Railroad on the other part. This judgment was obtained in 1872 or 1873. *Third*. He insists that the notice of this alleged lien was given at the sale under the Schutte decree by a Mr. Lewis, through Mr. George P. Raney. The original deed of trust, under which the intervenor claims, was made to Bailey & McGeehee, and was recorded on the 5th day of February, 1870, before the said bonds were sold. This, it is insisted, gives to that deed of trust a priority over any title acquired under the sale of the state bonds by virtue of the internal improvement lien. To the argument of defendants that there was no lien recorded in Jefferson county, in which the branch road in question is wholly situate, they

insist that the deed of trust to Lewis and Hawkins is there recorded on all the property of the Pensacola & Georgia Railroad Company, and the branch to Monticello was a part of the property when the deed of trust was executed. They insist, further, that the bonds issued under the internal improvement act attached only as a lien to that portion of the Pensacola & Georgia Railroad and its property mentioned in the statute, and that the branch to Monticello was not therein included. They insist, therefore, that Lewis and Hawkins, the latter of whom is the intervenor, have the only lien on this branch. They insist there was no necessity for record of this lien. They insist that the action of the governor of Florida and the trustees of the internal improvement fund was wholly illegal, and that the intervenor and those whom he represented were not estopped upon failure to protest against the sale by the state authorities. They insist that the lien enforced by the sale under the decree in the Schutte case was immaterial, as the decree in that case was rendered without reference to the rights or interests of the persons whom the intervenor represents; they insisting that, the state courts having taken jurisdiction of the subject-matter, the federal court, would not presume to interfere. They insist that the confirmation of the sale by the federal court did not have the effect to nullify the decree of the state court to the effect that the lien of the internal improvement fund did not attach to the branch between Drifton and Monticello.

In reply to the argument that the railroad company dismissed its bill against the intervenor's rights in the state court of Escambia county for the reason that the intervenor had sought the jurisdiction of this court, the intervenor insists that his purpose by the intervention was to prevent a conflict of jurisdiction, and not to try any question of title or lien in this court, as the receiver of the company can claim nothing here more than could have been claimed by the Florida Railway & Navigation Company. That company having dismissed its bill in the circuit court of Escambia county, the receiver is estopped from setting up any rights against the claim of petitioner in this court. The receiver is governed by the action of the Florida Railway & Navigation Company in dismissing its bill; he has no concern in the matter. The record in Escambia county estops him. To the point made by defendants that Hawkins, now the intervenor, was receiver of this court, and conducted the sale of the Jacksonville, Pensacola & Mobile Railroad in the Schutte case, the intervenor insists that, while Hawkins, with his co-receiver, did conduct the sale, a notice of the decree in favor of the intervenor was given at that sale before the bidding, that notice being that

any person purchasing the railroad from Monticello to the junction at Drifton would take the same subject to the lien of the decree in the state court in favor of the trustees of the Freeland bonds; that neither Hawkins nor any person acting with him, who was interested in the decree of the state court, was impleaded in the Schutte case, and hence the decree in that case in no wise affected their interest. To the argument of the defendant that neither the petitioner nor any of his purchasers have been in possession of the branch to Monticello, and that the Pensacola & Georgia Railroad Company built it, and always had possession of it until sold by the trustees of the internal improvement fund, and that it has passed to several subsequent purchasers since that sale, the intervenor insists that, while this branch did belong to the Pensacola & Georgia Railroad, it was not covered by the lien of the Pensacola & Georgia Railroad bonds, which were indorsed by the trustees of the internal improvement fund. That it was conveyed as a security for the payment of the Freeland bonds, and that the trustees of those bonds were prompt in asserting their lien. They had the first sale set aside by a decree of the state court. They gave notice of the decree by a subsequent sale. That subsequent attempted sales have been provided, and that notice to said trustees of the decree in the state court has always been notice, not only of their lien, but of its recognition and enforcement by a court having jurisdiction.

The court has considered the arguments and briefs of the solicitors, and has examined the voluminous records in evidence, with very great care. It has thus reached the conclusion that the liens of the state bonds of January 1, 1870, covered the branch road from Drifton to Monticello, and this branch was lawfully sold by the trustees of the internal improvement fund. This view has received apparently the conclusive sanction of the supreme court of the United States in the case of Florida Cent. R. Cos. v. Schutte, 103 U. S. 120, 3 Am. & Eng. R. Cas. 1. The recital in the language of the chief justice is as follows: "The Florida, Atlantic & Gulf Central Railroad Company, incorporated by the general assembly of Florida in 1853, built a railroad from Jacksonville to Lake City. The Pensacola & Georgia Railroad Company, also incorporated during the same year, built a road from Lake City through Tallahassee to Quincy, in the direction of Mobile, with a branch to Monticello; and the Tallahassee Railroad Company, incorporated at a somewhat earlier date, built another road from Tallahassee to St. Marks. Each of these companies became indebted to the state of Florida under the provisions of the internal improvement law; and, as a consequence, the road of

Lien of bonds
covered
branch road.

the Florida, Atlantic & Gulf Central Company was sold on the 4th of March, 1868, by the trustees of the internal improvement fund, under the authority of law, to William E. Jackson and his associates; that of the Pensacola & Georgia Company on the 6th of February, 1869, to F. Dibble and his associates; and that of the Tallahassee Company on the same day and to the same parties."

See, also, *State v. Anderson*, 91 U. S. 669; *Internal Imp. Fund v. Jacksonville, P. & M. R. Co.*, 16 Fla. 708; *Holland v. State*, 15 Fla. 456.

We find that the Pensacola & Georgia Railroad Company had authority by its charter to build and operate the branch in question, (see McClel. Dig. p. 1056, § 31;) that the Pensacola & Georgia Railroad Company was incorporated with the Jacksonville, Pensacola & Mobile Railroad Company; and that by the acts of Florida June, 1869, and the amendment of January, 1870, the statutory lien was created that all bonds issued by the railroad company under this legislation were made a first mortgage or lien on the roadbed, iron, equipment, workshops, depots, and franchises, (McClel. Dig. p. 590, § 3;) that the holders of the bonds in a decree obtained authority for the sale of the road and the branch in controversy under the statutory lien of 1869; that in the same decree the trustees of the internal improvement fund were authorized to sell to recover the unpaid purchase money due by virtue of the sale under the internal improvement act; that this decree applied as well to the particular branch in controversy as to the entire road; and that the complainants, who are the bondholders under the acts of June, 1869, and January, 1870, in February, 1882, by regular procedure caused the sale of the road and the branch from Monticello to Drifton. The Florida Railway & Navigation Company went into possession under conveyances of February, 1882. The latter company, we further find, issued the bonds and deeds of trust which have been enforced upon the main line and as well upon the particular branch in the several causes in which this intervention is made. These findings are ascertained from the bill in the Schutte case and the decree thereon, and certified copies of the reports of the masters A. B. Hawkins and S. Conant. We find further that the deed of trust from the Pensacola & Georgia Railroad Company, made to William Bailey and John C. McGeehee on April 1, 1860, which invested the said trustees with a lien on said railroad, including said branch, was second in dignity to the lien under the internal improvement act, but was a first lien on all other property of the Pensacola & Georgia Railroad Company; that this deed of trust was recorded in Jefferson

Findings of
court.

county, Florida, on the 5th day of February, 1870, in which county the said branch road is wholly situate. We find further that a decree was rendered in the circuit court of the second judicial circuit of Florida in and for Leon county, in a cause wherein Benjamin C. Lewis and Alexander B. Hawkins, as trustees for the bondholders of the Freeland bonds, issued by the Pensacola & Georgia Railroad Company, and John McDougall and the said Benjamin C. Lewis in their own rights, were plaintiffs, and the Jacksonville, Pensacola & Mobile Railroad Company, John G. McGeehee, trustees for the holders of the Freeland bonds issued by said Pensacola & Georgia Railroad Company, Richard A. Whitfield and William M. Miller, administrators of John Miller, deceased, and others were defendants; that this proceeding was under the practice known as the "Code Practice," then in force in the state of Florida; that the question of law raised by the pleadings was passed upon, and the court then decreed that the said branch road was not covered by the liens in favor of the bonds issued under the internal improvement act, and that the sale by the said trustees of August, 1869, did not pass the branch road, and did not carry with it the sale of the said branch road, and that the branch road was subjected to the liens of the bonds represented by the petitioner as trustee, and that the legal title to the said branch was, at the time of said decree, in the trustee for the benefit of the said bondholders; that at the sale of the said Pensacola & Georgia Railroad and branch, made under the Schutte decree by the petitioner and another as masters, in 1879, notice was given by B. C. Lewis that any person purchasing this said branch would take the same subject to the lien of said decree and the lien of the bonds issued thereunder and then outstanding, amounting to several thousand dollars; that this decree was never recorded in the circuit court records of Jefferson county; that no judgment roll was ever filed with said decree in the proper court, either of the county of Leon or Jefferson. We further find that the Pensacola & Georgia Railroad Company, by bill filed for that purpose in the Leon circuit court and transferred to the circuit court of Escambia county, Florida, enjoined the sale of said branch road as advertised to be made by the decree of the circuit court of Leon county as aforesaid; that the defendants answered said bill for injunction; that afterwards, on the 9th day of February, 1886, the petitioner intervened in this court, praying therein, among other things, that the receiver pay into this court the sum of \$40,000, as the estimated value of said branch, and for such other and further relief as the court might deem the petitioner entitled to; that leave was granted to file said petition, and the peti-

tioner became an intervenor in this suit; that afterwards, and on the 6th day of March, 1886, the Florida Railway & Navigation Company dismissed their bill for injunction, then pending in the Escambia circuit court; that the petitioner subsequently filed his amended petition, and therein prayed for an allowance to make a sale under the decree of the circuit court of Leon county, and that the receiver be directed and required to bid at said sale such an amount as shall be ascertained by a commission of this court to be the value of said branch, and for other and general relief; that to this petition and amended petition the receiver in this cause made answer, and that upon the issue joined the several parties have filed record evidence and depositions, upon which the foregoing facts are made to appear.

With relation to the reasons presented for the relief they seek by the solicitors for the intervenor the court has reached the following conclusions: The notice given by the counsel representing the interest of the intervenor at the sale under the decree in the Schutte Case appears to have been superfluous, and without legal effect. It was a judicial sale, and the purchaser must have bought with notice of the existence of all previous valid incumbrances. It is insisted in the able and elaborate brief of Mr. Henderson that the solicitors who gave this notice represented also clients who, under the decree of sale, had a first lien on the property with relation to which he gave the notice of an adverse trust. That, besides that, one of the trustees who was making the sale was the co-trustee with Lewis for the interest concerning which the notice was given, and that Lewis himself was a party defendant to the suit of Schutte against the railroad companies, in which the decree was rendered; and he urges for these reasons that there was no virtue in this notice. These considerations, were it indeed practicable to evolve from the cumbersome record their merit or their refutation, we would regard as of minor importance. The notice was given to call the attention of purchasers to a judgment of the court of Leon county, which, if binding on the parties, was itself notice to the world. If invalid, the notice could not give it validity; and we are clearly of the opinion that the circuit court of Leon county had neither jurisdiction of the persons nor of the subject matter involved in the litigation. The suit was begun long after the date of the Florida state bonds, (January 1, 1890,) and even long after their actual issue; and under the authority of *Ketchum v. St. Louis*, 101 U. S. 306, we think not only the trustees of the internal improvement fund, but the bondholders under the act of 1870, or their sufficient representative, were necessary

Decree of
court invalid.

parties. See, also, Story, Eq. Pl. § 178, note; Williams *v.* Bankhead, 19 Wall. (U. S.), 563. This was an exceptional case. The sovereign state of Florida had issued its bonds, having contingent liens on all their property. It was a matter of public notoriety that these bonds were in the hands of holders for value, and if it was contemplated to sell a valuable portion of the property, not merely the equity of redemption, and thus divest the lien of the state as well as the rights of the bondholders who had invested with confidence in the validity of its obligations, the case would seem to stand on a different footing from the ordinary controversy between prior and junior mortgages. The subsequent crop of litigation abundantly shows this. There were many things to be settled before the judgment of the circuit court of Leon county could be regarded as conclusive. The state of Florida would not have been made party against its will, but it might have intervened and protected its interest, had proper notice been given. Elliot *v.* VanVoorst, 3 Wall. Jr. (U. S.), 299. There was no notice given in this case in the state court, and none of the incumbrances were represented. Besides, it seems that Jefferson county had exclusive jurisdiction of the proceeding so far as it was justified by the trust deed of 1860. Either the branch road from Monticello to Drifton was independent of the main line or a part thereof. If a part of the main line, it was clearly subject to the lien of the internal improvement bonds. If an independent line, it was wholly within Jefferson county; and it would seem that a proceeding to sell the road would not have been maintainable in Leon. Code Proc. Fla. § 74, Bush. Dig. 477; McClell. Dig. p. 766, § 5; Pittsburgh & S. L. R. Co. *v.* Rothschild (Pa.), 26 Am. & Eng. R. Cas. 57. The judgment of a court without jurisdiction of the parties or subject matter is void, nor could the right of the bondholders be affected by the acquiescence of their debtors without their consent. This judgment in Leon county seems to have been obtained by default. The recital that "it appears from the allegation of the complaint, and not denied in the answer," etc., indicates as much. It is nevertheless recited in the complaint on which the judgment was taken in Leon county that the Pensacola & Georgia Railroad Company was authorized to construct a branch road to the county seat of Jefferson county; that this was done on the 5th day of December, 1855; that on the 10th of the preceding February the Pensacola & Georgia Railroad gave notice to the trustees of the internal improvement fund of their acceptance of its provision, that the said branch line was seized and sold by said trustees. The complaint further recites that the Pensacola & Georgia Railroad bargained, sold, and conveyed

the depots, franchises, and equipments of said road to Bailey and McGeehee in the event of the payment of the Freeland bonds, and in default of the payment of the said Freeland bonds for three months the trustees should have the power to take possession of said roadway, depots, stations, franchises, and equipments of said company without any judicial or preliminary process whatever, and the same to sell, lease, or otherwise dispose of, as in their discretion they may deem best for the interest of the bondholders. It recites further that the said McGeehee as trustee, the said Pensacola & Georgia Railroad acquiescing therein, did convey to Alexander B. Hawkins and Benjamin C. Lewis large bodies of land, to be held upon the same uses and trust as the same were conveyed to the said Bailey and McGeehee by the said Pensacola and Georgia Railroad Company. The complaint points out a doubt on the part of the said McGeehee as to whether he did divest himself of the legal ownership of the roadway, depots, stations, franchises, and equipment of the said Pensacola & Georgia Railroad Company. This doubt on the part of Mr. McGeehee seems to be not entirely without foundation. The rights of the public in railroad corporations and their franchises created and granted for the public welfare have been defined with great distinctness since the date of this conveyance to Bailey and McGeehee in 1860. It is not now regarded that to sell out and part with the title to its franchises is an ordinary and usual function of a railroad company. The power to lease a railroad, its appurtenances and franchises, is not to be presumed from the usual grant of power in a railroad charter; and, unless authorized by a legislative action so to do, one company cannot transfer them to another company by lease, nor can the other company receive and operate them under such lease. *Oregon R. & Nav. Co. v. Oregonian R. Co.*, 130 U. S. 1, 39 Am. & Eng. R. Cas. 176. Whether or not this doctrine is applicable to the case at bar, it would seem indisputable that, if an important part of the claim in the Leon county case was on account of the foreclosure proceedings of the trustees of the internal improvement fund, they were indispensable parties, and a decree without them would be a nullity.

It is insisted, besides, with great confidence, before the judgment in Leon county could be a valid lien on real estate situate in Jefferson county it must have attached thereto a judgment roll, and must be recorded in the county where the real estate is situate. Code Proc. Fla. §§ 45, 46, 227, Bush. Dig. 469, 516; McClcl. Dig. 619. It is insisted further that this has never been done. On the argument of this cause at Jacksonville the judgment roll

Recording
Judgment.

was not produced, but since that time, and while the court has had the case under advisement, a certified copy of this paper has been forwarded the court, it having been discovered by the Honorable ——— RANEY, who was formerly of counsel in the cause. It does not appear, however, to have been recorded in Jefferson county; but, without passing on the technical question involved, which is necessarily unfamiliar to one unacquainted with the local laws of the state, and merely stating it for the benefit of all concerned, we prefer to rest our opinion upon the want of jurisdiction of the Leon county court, and the want of indispensable parties, before adverted to. It would be indeed a serious matter if a title perfected by the decrees of the United States courts, by which all parties at interest were bound, could be unsettled by a judgment by default in a county of the state where the property was not situate, and where indispensable parties were not made.

For the foregoing reasons the court is compelled, in its opinion, to deny the application of the intervenor. The present purchasers, who have succeeded to the rights and equities of the purchasers under the Schutte decree in 1879-81, obtained on the road and this branch a first lien for the trustees of the internal improvement fund on bonds authorized to be issued in 1855, and a subordinate lien second only to that last above mentioned in favor of the holders of \$2,800,000 of the Florida state bonds bearing date and lien as of January 1, 1870. They also acquired under the sale of March 20, 1869, all the rights of the trustees of the internal improvement fund in and to the Pensacola & Georgia road and this branch. We gravely doubt whether the Pensacola & Georgia Company had the power to pledge their entire assets and franchises to the trust which the intervenor represented. They were authorized to borrow money to carry into effect the object of their charter, to issue certificates or other evidences of such loan, and to pledge the property of said company for the payment of the same and the interest. These powers were never enlarged. This is far short of a power to execute a conveyance which stipulates that in the event of the default in the payment of the interest or principal which shall have remained in arrears for the space of three months the creditor shall have power to take possession of the said railways, depots, stations, franchises, and equipments of said company without any judicial or other preliminary process whatever, and the same to sell or lease or otherwise dispose of, as in their discretion they may deem best for the interest of the bondholders. The application of petitioner is refused, and the intervention is dismissed at the cost of the

**Intervenor's
application
denied**

intervenor, and the decree of the court will be framed accordingly.

ROBINSON

v.

IRON R. CO.

(135 *United States*, 522.)

Foreclosure of Mortgage—Bill to Set Aside Sale.—The holder of second mortgage bonds of a railroad company filed a bill in equity, on behalf of himself and all the other holders of second mortgage bonds, to rescind a sale of the road made under a decree of foreclosure to a committee of the first mortgage bondholders, or to have the sale declared to be in trust for both classes. Fraud was not alleged, and it did not appear that the second mortgage bondholders had made any offer to redeem. It was not averred that there was any consideration for an alleged agreement that the second mortgage bondholders should share in the purchase. Neither was it averred that the property was sold for less than its actual value. The complainants had notice of the foreclosure suit and might have intervened. The bill alleged no collusion on the part of the trustee. The foreclosure suit was brought to foreclose both mortgages, and it did not appear that the second mortgage bondholders could have prevented the decree entered by the court. The complaint did not make the members of the committee of the first mortgage bondholders, who were alleged to have made the agreement that the second mortgage bondholders should share in the purchase, parties to the suit. *Held*, that the bill could not be sustained.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

Geo. W. Morse, for appellant.

J. C. Coombs and *C. H. Hanson*, for appellees.

BLATCHFORD, J.—This is a suit in equity, brought in the circuit court of the United States for the southern district of Ohio by William Robinson, in behalf of himself and all the other holders of the second mortgage or income bonds of the Iron Railroad Company who desire to come in and aid in the prosecution of the suit, and to contribute to the expenses thereof, against the Toledo, Cincinnati & St. Louis Railroad Company, the said Iron Railroad Company, the Iron Railway Company, (all three of them being corporations of Ohio,) the Central Trust Company of New York, a New York corporation, and John C. Coombs. Case stated.

The substance of the material allegations of the bill is as follows: On the 5th of August, 1881, the Iron Railroad Company executed to the Central Trust Company of New York, hereinafter called the "Trust Company," a first mortgage covering its line of railroad and other property between the Ohio river, in Lawrence Allegations in bill.

county, and the south line of Jackson county, Ohio, including sundry other lines in Lawrence county, to secure \$500,000 of 6 per cent. gold bonds. On the 1st of August, 1881, the company executed to the same trust company its second mortgage on the same railroad property and lines to secure \$500,000 of 6 per cent. income bonds. This mortgage was made expressly subject to the other one. The interest to be paid on the income bonds was to be such amount, not exceeding 6 per cent. per annum, as the company should annually declare to be the year's installment of interest payable out of the net earnings of the lines of railroad of the company, interest not to be accumulative, and none to be considered due and payable except out of net earnings applicable to the purpose, and when the amount should have been ascertained and declared by the board of directors. The plaintiff is the holder and owner of 25 of such income bonds, of \$1,000 each. The interest on the first mortgage bonds was payable absolutely, semi-annually, on the 1st days of January and July, on the presentation of coupons annexed to the bonds. Afterwards the Iron Railroad Company was consolidated with the Toledo, Delphos & Burlington Railroad Company, an Ohio corporation; and the latter was afterwards consolidated with the Toledo, Cincinnati & St. Louis Railroad Company, another Ohio corporation. In August, 1883, the latter corporation was put into the hands of a receiver. The earnings of the road of the Iron Railroad Company were at all times sufficient to pay interest on the first mortgage bonds, and to pay a large interest on the second mortgage bonds. The holders of the second mortgage bonds had no voice in either of the consolidations, and the trust company never assented to them. Both consolidations were illegal, collusive, fraudulent, and void. No dividend was ever declared payable to the holders of the second mortgage bonds, though it was fairly earned. So the holders of such bonds had no opportunity to enter for a breach of the conditions of the mortgage and to operate the road. The earnings of the Iron Railroad, which ought to have been applied to keep down the interest on its bonds, were largely diverted, in consequence of its consolidation with the other roads, and applied to pay their expenses; and the holders of the second mortgage bonds have an equitable lien, on the property of the companies with which the Iron Railroad Company was consolidated, to have refunded the amount of such diverted earnings, and to have them applied to pay the interest on the two classes of bonds. By the terms of the first mortgage, the trust company could have entered at any time after the failure to appropriate the earnings to pay the interest, and could have had the earn-

ings of the Iron Railroad kept separate; and there would have been a surplus to be devoted to paying the interest on the second mortgage bonds. The trust company, being a trustee under both mortgages, was bound to execute its trust for the benefit of the holders of both classes of securities; but, by reason of the apparently inconsistent positions occupied by the trustee, the holders of the second mortgage bonds had no fair notice of the proceedings to foreclose and sell the property, and the trustee gave no notice to any of the holders of the second mortgage bonds of such proceedings; and they were unrepresented therein, and had no opportunity to present to the court the facts set forth in the bill.

In July, 1883, the trust company filed a bill in equity, in the circuit court of the United States for the southern district of Ohio, against the Toledo, Cincinnati & St. Louis Railroad Company, to foreclose the mortgages; and the defendant company appeared, and submitted to a default and a decree of foreclosure. A receiver and a special master were appointed, and the receiver was ordered to keep a separate account of the earnings of each division, which he proceeded to do on November 1, 1883. The special master found that the net earnings of the Iron Railroad for the five months from November 1, 1883, to April 1, 1884, were \$33,716.37. On the 15th of July, 1884, five persons, whose names are given, holders to a greater or less amount of the first mortgage bonds, became a committee of the first mortgage bondholders, under a contract whereby they were to purchase the Iron Railroad, with all its property, under the decree of sale. All, or substantially all, of the first mortgage bondholders signed the contract with the committee; but the second mortgage bondholders had no notice thereof, and were not invited to participate in the appointment of the committee. A copy of the agreement is annexed to the bill. It contained a provision authorizing the committee to negotiate for a participation by the second mortgage bondholders in the benefits of the trust created by the agreement. On the 10th of June, 1884, the holders of the second mortgage bonds were called together in Boston, and a committee of five of them, of whom the plaintiff was one, was appointed to confer with the committee of the first mortgage bondholders in regard to a participation in the reorganization of the company, and to take such other steps as might be necessary to protect the interests of the second mortgage bondholders. On the 19th of June, 1884, the two committees met, and it was agreed between them that the second mortgage bondholders should participate in the reorganization, and should rank therein, substantially, as they ranked previously, subject to a fair division of expenses, it

being understood that a plan of reorganization should be submitted, and that the committee of the first mortgage bondholders should purchase the property at the sale. The railroad and property were sold on the 28th of June, 1884, in pursuance of the decree, and the defendant Coombs, acting for the committee of the first mortgage bondholders, purchased the same for \$500,000, and, as the plaintiff assumed and had reason to believe, for the benefit of both classes of security holders. The sale was confirmed on the 18th of July, 1884; and on the 31st of July, 1884, the committee of the second mortgage bondholders submitted to the committee of the first mortgage bondholders a plan for reorganization, a copy of which is annexed to the bill, with a copy of a letter from the committee of the second mortgage bondholders, accompanying it. Meantime, immediately after the sale, the committee of the first mortgage bondholders proceeded to organize, under the laws of Ohio, the defendant corporation the Iron Railway Company, with the intention of transferring the property to it when the sale should be confirmed. The Iron Railway Company is capitalized at \$600,000, with the purpose of issuing its stock, dollar for dollar, to the first mortgage bondholders for their bonds, and for two years' unpaid interest, and for expenses, without recognizing the rights of the second mortgage bondholders. Coombs has transferred the railroad and property to the Iron Railway Company, which is composed of the parties who made up the first mortgage bondholders, and no new or innocent party holds the stock thereof; and the corporation and the holders of its stock had full notice from the beginning of the rights of the second mortgage bondholders. In August, 1884, notice of the claims of the second mortgage bondholders was published in certain newspapers in Boston, where both classes of securities are largely or entirely held. On the 5th of August, 1884, the committee of the second mortgage bondholders served upon each member of the committee of the first mortgage bondholders a notice asserting the rights of the second mortgage bondholders, and a like notice upon the Iron Railway Company, and also published a like notice in two Boston newspapers: all of which was done before the Iron Railway Company issued the stock. In the various statements which appear as a matter of public record, the trust company and the Toledo, Cincinnati & St. Louis Railroad Company have alleged that the earnings of the Iron Railroad Company have been sufficient, if kept separate, to pay the interest on the first mortgage bonds; such statements being made in the papers filed in the various foreclosure proceedings to foreclose the various divisions of the Toledo, Cincinnati & St.

Louis Railroad Company. The committee of the first mortgage bondholders, have stated repeatedly, in a public way, that their road was earning sufficient to pay the interest on the first mortgage bonds; and such claim was made by them, and by all that class of bondholders, when the Toledo, Cincinnati & St. Louis Railroad Company first ceased to pay interest on the first mortgage bonds.

No demand was ever duly made by the holders of the first mortgage bonds for their interest, in accordance with the terms of their mortgage, nor by the trust company as trustee. A portion of the property alleged to have been purchased under the decree of foreclosure and sale is covered by the second mortgage, and not by the first, although it is claimed by the purchasing committee, and asserted to have been conveyed to the Iron Railway Company. The Iron Railway Company claims that, by virtue of its title from the committee of the first mortgage bondholders, it has acquired a right to the entire income, from whatever source, of the Iron Railroad Company, and all its property and franchises, although the same may exceed the sum sufficient to pay the interest on such first mortgage bonds. There can be no valid decree of foreclosure and sale which will deprive the second mortgage bondholders from participating in the net profits and income, after paying the interest on the first mortgage bonds. By the terms of both mortgages, the property, if sold, was to be sold in the city of Ironton, Ohio, and the same place should have been adopted when sold under decree of the court. The net earnings of the Iron Railroad Company should have been applied, from the time of the appointment of the receiver, to pay the interest on the first mortgage bonds; and the balance should have been left for the subject of an account between the receiver and the second mortgage bondholders, in accordance with the terms of the mortgage.

The bill prays for an answer under oath, and also for a notice to the second mortgage bondholders to come in and aid in the prosecution of the suit; that the sale to the committee of the first mortgage bondholders be rescinded, or so far qualified as to be declared to be in trust for both classes of bondholders; that the sale to the Iron Railway Company be rescinded, or be declared to be for the benefit of both classes of bondholders; that an account be taken of the amount of the earnings of the Iron Railroad Company, applicable to the payment of interest on its first and second mortgage bonds, received since the road was placed in the hands of a receiver, and also an account of the amount of earnings diverted by the consolidation prior to the appointment of a receiver, and an account of the amount

Relief prayed for.

of property under the control of the court which ought to be applied upon the bonds in lieu of such diverted earnings; for the application of the same, first, in payment of the interest overdue on the first mortgage bonds, and the balance, if any, after that, in payment of interest up to the specified rate on the second mortgage bonds; and for general relief.

The Iron Railway Company and Coombs put in separate demurrers to the bill. The demurrer of the Iron Railway

**Allegations in
demurrer.**

Company alleges want of equity, and also multifariousness, in that the bill seeks both to have the foreclosure proceedings avoided and the sale set aside, and to obtain a participation in the benefits of the purchase of the property at the sale, and also alleges that it appears that the plaintiff has not been injured by the foreclosure proceedings, and that he might, with diligence, have prevented or remedied any injury by intervening in the proceedings; that for all such injury there was a plain, adequate, and complete remedy at law, in a suit against the trust company; that it is admitted by the bill that default was made in paying the interest due to the holders of the first mortgage bonds, which continued up to the time of the sale of the road, and still continues, but it contains no offer to pay the bonds, or the interest due on them, or to redeem the property from the first mortgage; that it does not allege any privity with, or duty or liability to, the second mortgage bondholders, on the part of the first mortgage bondholders, nor any common interest between them; that, as to so much of the bill as rests upon any alleged agreement or undertaking on the part of the committee of the first mortgage bondholders, whose names are given in the bill, it appears that all of them are necessary parties, and none of them are made parties; that all of them and the plaintiff are citizens of Massachusetts, and that this court has no jurisdiction to enforce the alleged agreement; that the agreement is not sufficient in form or certainty to permit its enforcement, or to warrant any recovery of damages on account of any breach of it, that no consideration is alleged for it, nor is it alleged to be in such form as imports consideration, that the committee were not authorized to make any such agreement with the second mortgage bondholders; that such agreement and this suit admit the competency of the organization of the Iron Railway Company, and such agreement and the alleged authority therefor do not appear to be competent to create any privity with, or duty or liability to, the plaintiff, on the part of the Iron Railway Company and its stockholders; that it does not appear that Coombs was in privity with, or incurred any obligation or liability to, the plaintiff, or any of the second

mortgage bondholders, or was served with any notice or had any knowledge of any undertaking in behalf of any second mortgage bondholders, or of any violation thereof, and no fraud, or knowledge of or complicity in any fraud, on the part of Coombs, is sufficiently alleged in the bill; that it is alleged in the bill that no foreclosure proceedings such as are set forth can bar the second mortgage bondholders from the net profits and income after the payment of the interest on the first mortgage bonds; and that for the recovery of any property formerly of the Iron Railroad Company which may not have been covered by the first mortgage, but may have been covered by the second mortgage, it appears that the parties in interest have a plain, adequate, and complete remedy at law. The demurrer of Coombs is to the same effect as that of the Iron Railway Company.

On a hearing on the bill and demurrers a decree was entered dismissing the bill with costs. An application for a rehearing was made, on an allegation of surprise and accident, by reason whereof the case was not properly presented on the part of the plaintiff. On a hearing on the application a decree was made which states that the plaintiff was heard in support of his application, as well upon all matters which he had to advance on the insufficiency of the prior hearing as upon any alleged error in the judgment thereupon rendered, and the defendants were not only heard in support of the sufficiency of the hearing, and the correctness of the judgment, but "also offered in open court, for the purpose of preventing any amendment hereafter to said bill by incorporating therein an offer to redeem said Iron Railroad either from the lien of the first mortgage, or from the purchaser, if and whenever in the future the circumstances and parties may have become changed, and said property may have increased in value, to waive all objection to said bill, if said complainant would amend the same forthwith by making such an offer to redeem, and accept a decree of this court limiting the time therefor, and, on default in making such redemption, to be forever barred and foreclosed of all right, title, and interest in said property; and said complainant declined said offer. And thereupon, upon consideration thereof, and for other sufficient reasons, as well as said offer by said defendants, said motion for a rehearing is denied, and said judgment sustaining said demurrer and dismissing said bill, with costs, stands confirmed." The plaintiff has appealed from the decree dismissing the bill.

Decree dismissing bill—
Rehearing
denied.

It is impossible to sustain this bill as against the demurrers. There is no allegation of any actual fraud. There is no offer

to redeem. There is no averment of any consideration or mutuality in the alleged agreement between the two committees. There is no allegation that the property was sold for less than its actual value. The bill admits that the claim of the first mortgage bondholders is superior to that of the second mortgage bondholders, and the failure of the plaintiff to offer to redeem is evidence that he does not think the property was worth more than it brought at the sale. If the plaintiff or the second mortgage bondholders had exercised due diligence, they might have intervened in the foreclosure suit. No fraud being alleged, the proper remedy, if any legal injury was sustained by them, was to apply to the court in which the foreclosure took place to set aside the decree or the sale. The bill does not allege any fraud as having been committed by any party to the foreclosure suit, or that the decree was any part of a fraudulent arrangement. There is no allegation of any fraudulent practice whereby any second mortgage bondholders lost any right to bid at the sale; nor can it be gathered from the bill that they ever had any idea of bidding or of contributing to the purchase.

As to the allegation in respect of the inconsistent positions of the trust company as a trustee under both of the mortgages, no collusion on the part of that company is averred; nor is it alleged that the company, so far as it did or could represent the second mortgage bondholders, was unfaithful to its trust. There having been an admitted default on the first mortgage, and the foreclosure proceedings having been properly instituted, there is an absence of any allegation in the bill that the second mortgage bondholders, if they had been parties to the suit otherwise than through the trustee, could have taken any steps which would have prevented the decree of foreclosure. The trust company was a trustee under the first mortgage, which was prior in right to the second. It discharged no more than its duty to the first mortgage bondholders; and it appears by the bill that the second mortgage bondholders had a meeting and appointed a committee 18 days prior to the sale, and thus had full knowledge of the situation of affairs, and full opportunity to apply to intervene as parties to the suit. Moreover, the bill alleges that the foreclosure suit was a suit to foreclose both of the mortgages, and, of course, according to their respective priorities. The bondholders were represented by their trustee, as is established by numerous decisions.

As to the other allegations in the bill, which question the proceedings which took place in the foreclosure suit prior to

Bill not
sustainable.

Inconsistent
position of
trust com-
pany.

the sale, they were matters proper for adjudication in that suit; and they cannot, under the circumstances of the case, be questioned in this suit. We have considered all of them, and pass them without further observation. Proceedings prior to sale.

As to the alleged agreement that the second mortgage bondholders should participate in the reorganization, the claim made in regard to it may be dismissed with a few words. If there was any such agreement which could be binding, it was an agreement with the members of the committee of the first mortgage bondholders as individuals; and they are not made parties to the suit, though their names are given. Committee of bondholders not parties.

Nor does the plaintiff represent the committee of the second mortgage bondholders, with whom the agreement is alleged to have been made. Nor does the Iron Railway Company represent the committee of the first mortgage bondholders. Independently of this, the alleged agreement is too vague and indefinite to furnish a foundation for its enforcement. On the showing of the bill, the parties never entered into any contract, and the court would have to make one for them. There was no mutuality in the agreement alleged, and no adequate consideration for it is stated or can be imported. These same considerations show that the agreement cannot be adjudged to create a trust for the benefit of the second mortgage bondholders. If the plaintiff or the other second mortgage bondholders have any right of action in respect of any such agreement, it must be one at law.

We have considered the various questions raised by the bill and the demurrers, and are of opinion that they do not need any further remark. Decree affirmed.

Foreclosure of Junior and Elder Trust Deeds—Jurisdiction of Federal Court—Substituted Service.—Where a railroad which is in the hands of a receiver appointed by a United States circuit court is sold under a decree of foreclosure to satisfy a junior deed of trust, and, while the property is still being administered by the court through its receiver, suit is brought in the same court against the company by the trustee in the elder deed of trust to foreclose it, the court having jurisdiction of the subject-matter has authority to make the purchaser under the first foreclosure sale, which was made subject to the prior deed of trust, a party defendant, and to order substituted service of process upon him, notwithstanding the fact that he is a citizen of the same state as complainant. *Farmers' Loan & Trust Co. v. Houston & T. C. R. Co.*, 44 Fed. Rep. 115.

Foreclosure of Several Mortgages only one of which is due.—A railroad company alleged its insolvency, and prayed for a sale of its property, and distribution of the proceeds among its creditors. A receiver was appointed. A mortgage creditor filed a cross-bill asking foreclosure of two mortgages, on both of which default in the interest had been made, but the debt se-

cured by the second only was due. *Held*, that both mortgages were properly foreclosed, though by its terms the first was not subject to foreclosure until default in payment of the principal at maturity. Even if it had been error to foreclose the first mortgage, the railroad company was not injured thereby, where it was hopelessly insolvent. *McIlhenny v. Binz* (Texas Sup. Ct., March 29, 1890), 13 S. W. Rep. 655.

An insolvent railroad company had issued several series of mortgage bonds, some of which mortgages covered all of its property, and others only part. The principal of some of the mortgages was due, and the company had defaulted on the interest of all of them. In addition it had a large floating debt, running into millions. There was no fair possibility of its being able to pay the accrued interest on the bonds and the floating debt without a sale of all its properties. *Held*, that a decree foreclosing all the mortgages, entered by consent of the creditors, would not be set aside at the suit of some of the stockholders on the ground that the principal of some of the mortgages was not yet due, as it was to the interest of the railroad company that the rights of all the mortgage bondholders should be cut off to enable the company to effect a reorganization which would secure and extend its bonded debt, and reduce the rate of interest thereon, and provide the necessary means to satisfy the floating debt. *Carey v. Houston & T. C. R. Co.*, 45 Fed. Rep. 438.

Foreclosure—Pledge of Bonds—Intervening Petition—Exception to Master's Report.—In proceedings to foreclose a mortgage on the property of a street railroad, where the bill contains no averment as to the pledging of the bonds, nor as to who were the holders of them, but only alleges that enough of them were outstanding to comply with the provisions of the mortgage as to foreclosure, an intervening petitioner cannot be expected to know these circumstances in advance of the evidence, and the fact that his petition of intervention makes no allegations as to the invalidity of the pledging of the bonds will not preclude him thereby from excepting to the master's report sustaining the validity of such a pledge. *Farmers' Loan & Trust Co. v. San Diego St. Car. Co.*, 45 Fed. Rep. 518.

Same—Unauthorized Pledge of Bonds.—It appeared upon foreclosure proceedings that the bonds of a street-car company, issued pursuant to a vote of the stockholders, "for the purpose of extending and constructing" the road, purchasing rolling stock and equipments, and paying "for labor done and to be done in the construction" and operation of the road, were never sold to procure funds for these purposes, but that after ineffectual attempts to sell them they were pledged by the president and vice-president of the mortgagor to secure antecedent indebtedness of the company, which to a large extent was due to other companies, of which also they were officers and directors. *Held*, that the pledge was without authority, and in fraud of the rights of the stockholders. *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, 45 Fed. Rep. 518.

Foreclosure of Second Mortgage—Redemption Rights.—To a bill to foreclose the first mortgage on the property of a railroad company the mortgagee of the income mortgage, the second mortgage on the property, was made a party, but the decree failed to foreclose the lien of the income mortgage. On a cross-bill to foreclose the second mortgage and to redeem, the court held that the purchaser at the foreclosure sale under the circumstances succeeded to the redemption rights of the original owner. *Held*, that it was entitled to present and be heard upon all objections that could fairly be made to the validity of the bonds sought to be recovered upon under the provisions of the income mortgage. As the income mortgage bondholders are seeking the aid of equity after the lapse of many years, and after interests have been acquired in reliance on the absolute title of the purchaser, they must come into court with clean hands, and as

their right to redeem is based upon the lien of the income mortgage which was not foreclosed, they are only protected to the amount of the bonds which were claims enforceable at the time of the foreclosure decree, and therefore the validity of the bonds sought to be proved up is open to investigation. *Simmons v. Taylor*, 38 Fed. Rep. 682.

Foreclosure of First Mortgage—Purchaser of Second Mortgage Bonds as Bona Fide Holder.—After a decree and sale under a first mortgage, a question arose as to whether the decree foreclosed the income mortgage. An examination of the record was had, and the conclusion reached that it did not. The income mortgage bonds were then sought out by certain parties, who purchased them at from 3 to 20 per cent. of the amount apparently due. The bonds had attached unpaid coupons nearly equal to their face value, and a cross-bill was then pending seeking a decree for the principal and interest on them. These purchases were made solely for speculative purposes, and for the purpose of enforcing them through the lien of the income mortgage. *Held*, that the purchasers were not *bona fide* holders, and could only enforce the bonds which were enforceable by the parties from whom they were purchased. *Simmons v. Taylor*, 38 Fed. Rep., 682.

Foreclosure—Intervention—Foreign Litigation.—In proceedings to foreclose railroad mortgages an intervening petition was filed by one claiming under a contract for the purchase of land from the land-agent of the company. It appeared that the land in question, together with other lands, was specially excepted by the orders appointing the receiver from the property thereby put into his hands, and that he had never come into possession thereof; that in none of the several principal causes was there any controversy about the lands, nor any declaration of lien thereon in the respective degrees. It further appeared that both intervenor and defendant company were citizens of the same state. *Held*, that the petition was properly dismissed, both as thrusting a foreign litigation into the suit, and for want of jurisdiction. *Cutting v. Florida R. & Nav. Co. (Wilson, Intervenor)*, 45 Fed. Rep. 444.

Foreclosure Sale—Disclaimer by Purchaser of Mortgagor's Lease.—Pending the foreclosure of a railroad mortgage the mortgagor leased to another railroad company an equal right to the use of a designated part of the road for a period of 20 years. The foreclosure decree provided that the purchaser at the sale should be at liberty to abandon or disclaim any leasehold interest or contracts or other agreements entered into by the mortgagor after the commencement of foreclosure proceedings. *Held*, that the purchaser's right to abandon and disclaim the lease, as provided in the decree, was not affected by the receipt of the rent by the receiver during the pendency of the foreclosure proceedings, and his acquiescence in the lease, and that all right of possession in the lessee ceased on being notified of the purchaser's intention to disclaim and abandon. *Farmers' Loan & Trust Co. of New York v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

Same—Same—Waiver of Right to Disclaim.—Shortly after a foreclosure sale, the purchaser notified the lessee of the road, under a contract with the mortgagor, of his intention to disclaim the lease and forbade the latter using the road at the expiration of thirty days from the date of the notice. *Held*, that the receipt of the rent for these 30 days by the purchaser, which was expressly stated to be without prejudice to its right to abandon the lease, was not such a consent to the lessee's possession as to constitute it a tenant from year to year, within the meaning of Rev. St. Ind. 1881, §§ 5207, 5208, which provide that all general tenancies where premises are occupied with the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year, to be determined by three months' notice to be given the tenant before the expiration of the year. *Farmers' Loan & Trust Co. of New York v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

Foreclosure Sale—Minimum Price.—It is not error to direct that the property of an insolvent railroad company when offered for sale under a decree of foreclosure to the highest bidder should not be sold for less than a certain sum. *McIlhenny v. Binz* (Texas Sup. Ct., March 29, 1890), 13 S. W. Rep. 655.

Sale of Franchise—Organization of New Corporation—When Old Corporation Ceases to Exist.—Code Miss. 1880, § 1038, provides that the franchise of a railroad corporation may be sold to satisfy a judgment, the purchaser to have the rights and duties given and imposed by the charter. Section 1039 allows six months for redemption. Section 1041 provides that all corporations, after their charters have expired or been annulled, shall nevertheless be continued bodies corporate for three years thereafter for the purpose of suing and being sued and closing up their business. *Held* that, where a railroad company franchise was sold with the rest of the property on a decree of foreclosure, and the purchasers organized a new corporation under an act of the legislature, the old corporation ceased to exist at the end of three years thereafter. *Ford v. Delta & Pine Land Co.*, 43 Fed. Rep. 181.

Foreclosure Sale—Right of Purchaser's Assignee to Writ of Assistance.—After a sale on the foreclosure of a railroad mortgage, the court directed its receiver to turn over the possession of the road to an assignee of the purchaser at the sale; the court reserving the right to resume the possession if the assignee should thereafter refuse to pay into court any part of the purchase price. *Held*, that this order brought the assignee within equity rule 10, which provides that every person, not a party to a cause, in whose favor an order has been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and that a writ of assistance would issue in favor of such assignee against another railroad company which unlawfully refused to surrender possession of part of the road. *Farmers' Loan & Trust Co. of New York v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

Sale of Railroad Before Rights of Parties Under Mortgages Have Been Determined—Interlocutory Order.—In *Pennsylvania R. Co. v. Allegheny Val. R. Co.*, 42 Fed. Rep. 83, it was held that in a proper case, a court of equity, having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory order for the sale of the property before the rights of the parties under several mortgages have been fully ascertained and determined. But in this class of cases a court of equity will never make such interlocutory order for an immediate sale upon terms discharging the lien of a mortgage, not yet due, unless it clearly appears, not only that in the end there must be a sale of the property, but a sale upon those terms. In this case the income bondholders secured by a junior mortgage, the plaintiffs in a cross-bill, petitioned the court, *pendente lite*, for an interlocutory order for the immediate sale of the property of an insolvent railway company defendant in the hands of a receiver, upon terms discharging the lien of two senior mortgages securing a large issue of bonds having a long time yet to run. The litigation involved the validity of the lien of these two mortgages, and that question was undetermined, and the final issue of the litigation was otherwise uncertain. *Held*, that the petition for a sale upon the proposed terms should be denied.

Compensation of Solicitors of Trustees in Foreclosure Proceedings.—In foreclosure proceedings there was no substantial contest, the whole matter being practically carried out in pursuance of a plan of reorganization, for which the solicitors for complainants were in no particular degree responsible. *Held*, that the sum of \$100,000 should be allowed as compensation to the solicitors who represented the trustees of all the mortgages. *Easton v. Houston & T. C. R. Co.*, 40 Fed. Rep. 189.

Reorganization in Connection with Foreclosure—Fraud on Stockholders.—

A proposed reorganization of a railroad company to be effected in connection with a foreclosure sale, by which the bonded indebtedness is refunded on longer time and at reduced interest, and which allows each stockholder to retain his stock on the payment of his *pro rata* share of the floating debt, is not a fraud on the stockholders, and will not be enjoined at the suit of some of them, who do not suggest any other method by which the financial embarrassments of the company can be met. *Carey v. Houston & T. C. R. Co.*, 45 Fed. Rep. 438.

Reorganization by Purchasers at Foreclosure Sale—Contract for Issue of Bonds—Equitable Relief.—A railroad company being insolvent, an agreement was made between the holders of its mortgages and a purchasing committee, whereby the latter were to buy the road at receiver's sale, rebuild it, and issue a new mortgage for \$50,000 to secure 50 bonds of \$1,000 each, and the former were to discharge their old mortgages, and take in lieu thereof 16 of the new bonds. The mortgage executed by the new company covered the 10 miles of road already completed and proposed extensions, and authorized a trustee, upon application of the directors, to certify and issue bonds "not exceeding at any time \$10,000 per mile of such railroad completed so that cars may be run thereon." Fifty bonds were issued, and an additional 50 were printed, and in the hands of the company. The mortgagees declined to receive their proportion of the new bonds because they were not such as required by the contract. The money for reconstructing the property was furnished by complainants, who relied for security on the performance of this contract, and ask for specific performance thereof, and that the 50 unissued bonds be delivered for cancellation, and that the railroad company be enjoined from issuing any other bonds on that part of its road without the consent of all the bondholders. *Held*, that the foregoing facts make a case for equitable relief. *Dester v. Ross*, (Mich., April 24, 1891), 48 N. W. Rep. 530.

UNITED STATES v. SOUTHERN PACIFIC R. CO. et al.**UNITED STATES v. COLTON MARBLE & LIME CO. et al.**

(*U. S. Circuit Court, S. D. Cal., March 6, 1891, 45 Fed. Rep. 596.*)

Land Grants—Bill to set aside Patent—Intersecting Grants.—Act Cong., March 3, 1871, granted certain lands to the S. P. R. R. Co. and provided that if its route, when designated, should be found to be on the line of any other road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. R. R. Co., so far as their routes should be on the same general line. In bills brought by the government to set aside a patent to the S. P. R. R. Co., it is alleged that the route of the A. & P. Co., to which land had also been granted, and the route of the S. P. R. R. Co. "cross each other in the state of California." *Held*, that this allegation does not bring the land within the exception of said act, and that under such allegation, even if proof showed that the routes are in fact upon the same general line, it would not avail the government.

Southern Pacific R. Co.—Right to Build Road and Earn Grant.—Act Cong. July 27, 1866, fully conferred upon the S. P. R. R. Co. the right to build the road described in and earn the land granted by that act, without the authority of the state legislature.

Same—Amalgamation—Recognition by Congress.—Act Cong. July 27, 1866, recognized the S. P. R. R. Co., organized under a general law of Cali-

fornia, and made it certain grants of land. Pursuant to Act Cal. Leg. March 1, 1870, authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, and Act April 4, 1870, in terms authorizing the S. P. R. R. Co. to file new and amendatory articles of association to enable it completely to conform, to Act Cong. July 27, 1866, S. P. R. R. Co., and other railroads, October 11, 1870, filed articles amalgamating and consolidating themselves into a new corporation,—S. P. R. R. Co. Act Cong. March 3, 1871, authorized the S. P. R. R. Co. of California (subject to the laws of California), to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the T. P. R. R. at or near the C. river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said S. P. R. R. Co. of California by Act July 27, 1866. *Held*, that congress thereby recognized that the S. P. R. R. Co. of California, existing March 3, 1871, under the articles of amalgamation and consolidation of October 11, 1870, was the same S. P. R. R. Co. to which the grant of July 27, 1866, was made. The authority conferred on said company by the act of March 3, 1871, to build the road designated, was made subject not only to the general laws of California authorizing railroad corporations to amalgamate and consolidate their interests and amend their articles of incorporation, but to the special act of April 4, 1870.

Same.—Pursuant to state authority, recognized by and made a part of the congressional grant of March 3, 1861, the S. P. R. R. Co., April 15, 1871, filed amended articles of incorporation, and August 12, 1873, filed, together with the S. P. Branch R. R. Co., articles of amalgamation and consolidation, under the name of the S. P. R. R. Co. *Held*, that while in one sense a new corporation was formed, each was substantially and practically the same S. P. R. R. Co. mentioned in the acts of congress, and was so recognized by congress, and that the articles of amendment, amalgamation, and consolidation were authorized by congressional as well as by state legislation.

Same.—Commissioners having from time to time been appointed to report in regard to the construction of the Southern Pacific Railroad, the road having been accepted by the president, and having been used by the government in the transportation of mail, military stores, etc., *held*, that these acts were acts recognizing the defendant company as the S. P. R. R. Co., to which the act of March 3, 1871, applies, and that the defendant company, being subject to burdens imposed by the act, is entitled to the benefits conferred by it as a consideration for those burdens.

Grant to Company, its Successors and Assigns.—Act Cong. July 27, 1866, having expressly granted lands to the S. P. R. R. Co., its successors and assigns, it is *held* that, if the consolidated company with the amended articles of incorporation is not technically the same corporation referred to in Act March 3, 1871, it is within the express provisions of the grant, being the successor or assign of said company.

Mexican Grants.—When Cease to be Sub Judice.—When a Mexican grant, by specific boundaries carrying all the lands within the designated boundaries, has been confirmed by a decree which has become final, the said decree specifically pointing out and designating the corners by natural objects on the ground, and the connecting lines, all lands outside those specific monuments and lines, from the date when the decree becomes final, cease to be *sub judice*, if they ever were in that condition, within the meaning of those terms as used by the supreme court in the cases of *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 638, and *U. S. v. McLaughlin*, 127 U. S. 428. *Ross, J., dissenting.*

IN EQUITY.

Joseph H. Call, Asst. U. S. Atty., (*W. H. H. Miller*, Atty. Gen., and *Willoughby Cole*, U. S. Atty., of counsel), for complainant.

Joseph D. Redding, (*Creed Haymond*, *A. B. Hotchkiss*, *J. D. Bicknell*, *C. H. Wilson*, *H. C. Rolfe*, *Chapman & Hendrick*, *Anderson*, *Fitzgerald & Anderson*, *Edwin Baxter*, and *J. L. Murphy*, of counsel), for respondents.

Before SAWYER, Circuit Judge, and ROSS, District Judge.

ROSS, J.—When these cases, which were argued and submitted together, were before the court on demurrers to the amended bills, (39 Fed. Rep. 132), it was held that the grant to the Atlantic & Pacific Railroad Company of date July 27, 1866, conferred upon that company no right of any nature to any particular piece of land within the indemnity limits of that grant prior to its selection, and, as a consequence that the fact that lands were within such indemnity limits did not exclude them from the subsequent grant to the Southern Pacific Railroad Company of date March 3, 1871, because of that provision of the act of July 27, 1866, (to which the act of March 3, 1871, referred for the terms of the grant to the Southern Pacific Company), which reads: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company." But because the amended bills showed on their face that the lands in controversy, which are within the indemnity limits of the grant to the Atlantic & Pacific Company and within the primary limits of that to the Southern Pacific Company, were at the time of the grant to the Southern Pacific Company claimed to be within the limits of the Mexican grant San Jose, which latter grant, it was alleged, was then *sub judice*, and because of that provision of the grant to the Southern Pacific Company to the effect that if the route it was authorized to designate should be found to be upon the line of any other railroad route to aid in the construction of which lands had been theretofore granted by the United States, as far as the routes are upon the same general line, the amount of land theretofore granted should be deducted from the amount granted to the Southern Pacific Company, coupled with the fact then alleged and by the demurrers admitted, that the routes of the two roads were upon the same general line, the amended bills were considered by the court to state, in each of those respects, good cause for annulling the patents issued to the Southern Pacific Railroad Company.

Since the ruling upon the demurrers the bills have been

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demurrers.

still further amended, and the cases are now submitted for decision upon the proofs taken and the master's report.

The bills as last amended omit the fact theretofore alleged that the routes of the two roads are upon the same general line, and the question decided upon the demurrers in respect to that point is therefore no longer involved. The allegation of the present bills in regard to that matter is that the two routes "cross each other in the state of California, as will more particularly appear" from a certain annexed map. The fact that is made the basis of the exception in question is that the two routes shall be upon the same general line, not that they cross each other. If the two routes are in fact upon the same general line and the government relied upon that fact for a recovery, it was of course essential that the fact be alleged. Not being alleged it cannot avail the complainant even if the proof shows that it exists.

In respect to the "present and prospective" clause of the act of July 27, 1866, I adhere to the views expressed when the cases were considered on demurrer, in so far as concerns the lands then and now involved, namely, lands within the indemnity limits of the grant to the Atlantic & Pacific Company, and do not care to add anything to what was then said on that point in regard to such lands.

One question remains for decision in each of the cases, namely: Should the patents issued to the defendant company be annulled upon the ground that the defendant, though having the same name, is a different corporation from that to which the grant was made, and that the company to which the grant was made did not build the road and thereby earn the granted lands? And in the consolidated cases Nos. 67, 68, and 69 there remains for decision the further question: Does the case show that the lands in controversy were, at the time of the grant to the Southern Pacific Railroad Company, within the claimed limits of the Mexican grant San Jose, and was that grant then *sub judice*?

The affirmative of both of these questions is urged with much earnestness on the part of the government.

The Southern Pacific Railroad Company was originally incorporated December 2, 1865, under a general law of the state of California, approved May 20, 1861 (St. Cal. 1861, p. 607), entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto." The act, among other things, authorized such corporations "to receive, hold, take and convey, by deed

Routes of two roads crossing each other.

Questions for decision.

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or otherwise, the same as a natural person might or could do, such voluntary grants and donations of real estate and other property of every description, as shall be made to it, to aid and encourage the construction, maintenance and operation of such railroad." The act also provided that it should be lawful for two or more railroad companies to amalgamate and consolidate their capital stock, debts, property, assets and franchises in such manner as should be agreed upon by the board of directors of such companies so desiring to amalgamate and consolidate their interests. By the act of congress, approved July 27, 1866 (14 St. 292), creating the Atlantic & Pacific Railroad Company and empowering it to construct and maintain a continuous railroad and telegraph line from Springfield, Mo., to the Pacific coast, congress recognized the Southern Pacific Railroad Company, organized as aforesaid, and authorized it to connect with the Atlantic & Pacific Railroad at such point, near the boundary line of California, as the Southern Pacific Company should deem most suitable for a railroad to San Francisco.

For the purpose of aiding the construction of the line authorized to be built, and thereby securing the safe and speedy transportation of mails, troops, munitions of war and public stores, congress, by the act of July 27, 1866, granted to the Atlantic & Pacific Railroad Company a right of way over the public domain and also made to it a grant of public lands along the route; and the railroad so to be constructed was declared to be a post route and military road, subject to the use of the United States for postal, military, naval and all other governmental service, and to such regulations as congress might impose for restricting the charges for government transportation. By § 18 of the same act, the Southern Pacific Railroad Company was given similar grants of land, subject to the limitations and conditions provided in the act, and was required to construct its road under like regulations as to time and manner as provided in respect to the Atlantic & Pacific Company. The grant thus made to the Southern Pacific Railroad Company was accepted by it on the 24th of November, 1866, and on January 3, 1867, it filed in the office of the commissioner of the general land-office a map showing its definite line of route from a point on the southerly edge of the bay of San Francisco, in a southeasterly direction, to a point on the east line of the state of California on the Colorado river, near the Needles. The Southern Pacific Railroad Company was not authorized by its original charter to extend its road to the Colorado river. But with a view to further the intent of the act of congress of July 27, 1866, and to

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enable the Southern Pacific Company to take the benefit of the grant thereby conferred upon it, the legislature of the state of California, on the 4th of April, 1870, passed an act entitled "An act to aid in giving effect to an act of congress relating to the Southern Pacific Railroad Company," St. Cal. 1870, p. 883, which reads as follows:

California act authorizing amendatory articles.

"Whereas, by the provisions of a certain act of congress of the United States of America entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California, approved July 27, 1866,' certain grants were made to, and certain rights, privileges, powers and authority were vested in and conferred upon, the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California; therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of congress, and all other acts of congress now in force, or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and assigns, are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power and privileges hereby granted to, conferred upon and vested in them, to construct, maintain and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of congress, hereby confirming to and vesting in said company, its successors and assigns, all the rights, privileges, franchises, power and authority conferred upon, granted to, or vested in, said company by the said acts of congress and any act of congress which may be hereafter enacted."

Shortly prior to this, and at the same session of the legislature, a general act was passed authorizing any corporation already formed, or thereafter to be formed, to amend its articles of association, Act March 1, 1870, (St. 1869-70, p. 107.) But the act of April 4, 1870, in terms authorized the Southern Pacific Railroad Company to file new and amendatory articles of association, and this for the avowed purpose of enabling it to more perfectly and completely conform to the act of congress of July 27, 1866; and the rights, privileges and powers conferred by the act of April 4, 1870, on the Southern Pacific Railroad Company were given to it, its successors and assigns.

This state legislation as was decided by the supreme court in the case of *California v. Central Pac. R. Co.*, 127 U. S. 44, was not necessary to empower the Southern Pacific Company to build the line of road authorized by the act of congress of July 27, 1866, and thereby to earn the granted lands, for the reason that the right to do so was fully conferred by congress itself. But it was enacted to remove all doubt in respect to the company's power to construct the road, and for the expressly declared purpose of enabling it to comply with the act of congress and thereby to receive the benefits conferred.

Effect of state
legislation.

It is stipulated by counsel in these cases that on the 11th of October, 1870, the Southern Pacific Railroad Company, the San Francisco & San Jose Railroad Company, the Santa Clara & Pajaro Valley Railroad Company, and the California Southern Railroad Company availed themselves of the aforesaid acts of May 20, 1861, and April 4, 1870, of the state legislature, and duly filed articles by which they amalgamated and consolidated themselves into a new corporation under the name and style of the "Southern Pacific Railroad Company," and did thereby vest in such new corporation their several capital stocks, debts, properties, assets, roads, telegraphs, lands, franchises, rights, titles, privileges, claims and demands of every kind—the object and purpose of the new corporation being declared in the articles to be—"To purchase, construct, own, maintain and operate a continuous line of railroad from the city of San Francisco, in the state of California, through the city and county of San Francisco, the counties of San Mateo, Santa Clara, Monterey, Fresno, Tulare, Kern, San Bernardino and San Diego, to some point on the Colorado river, in the southeastern part of the state of California, a distance of seven hundred and twenty miles, as near as may be; also a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, a distance of three hundred and twenty-four miles, as near as may be. * * *"

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of companies
composing So.
Pac. Co.

Such was the Southern Pacific Railroad Company when congress passed the act of March 3, 1871, (16 St. U. S. 573.) By that act congress incorporated the Texas Pacific Railroad Company, with power to construct and maintain a continuous railroad and telegraph line from Marshall, in the state of Texas, to a point at or near El Paso; thence through New Mexico and Arizona to San Diego, pursuing as near as might be the thirty-second parallel of latitude. To aid in its construction, congress gave it, also, the right of way over the public do-

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by congress of
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Co.

main, and made to it a grant of public lands along the route. The nineteenth section provided: "That the Texas Pacific Railroad Company shall be and it is hereby declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any state or territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard; provided, that said road shall be subject to the use of the United States for postal, military and all other governmental services at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service; and the government shall at all times have the preference in the use of the same for the purpose aforesaid."

The twenty-third section of the act is as follows: "That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado River, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six; *provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

In the case of Southern Pac. R. Co. *v.* Poole, 12 Sawy. (U. S.) 544, 32 Fed. Rep. 451, it was contended that at the date

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of March 3,
1871.

of the passage of the act of congress of March 3, 1871, the Southern Pacific Railroad Company was not authorized by its charter to build the line of road from Tehachapa pass, by way of Los Angeles, to connect with the Texas Pacific road, and, as by the twenty-third section of that act that company was "only authorized, subject to the laws of California, to construct a line of railroad from a point at or near Tehachapa pass," etc., the grant was necessarily inoperative and void. The court accepted the fact as there stated, that at the time of the passage of the act of congress the company did not have, according to the laws of California, the legal capacity to build the road on the line designated, and yet held against the contention. But according to the stipulation of counsel in these cases, the fact was not as there stated. At the time of the passage of the

act of congress of March 3, 1871, the Southern Pacific Railroad Company was, according to the stipulation of counsel, existing under the articles of amalgamation and consolidation, which was its charter, of October 11, 1870, entered into pursuant to the provisions of the state act already referred to; and, as has been seen, one of the purposes of the corporation as expressly declared in those articles was to construct, own, maintain and operate "a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles to the Texas Pacific Railroad, at or near the Colorado river, a distance of three hundred and twenty-four miles, as near as may be."

By the act of March 3, 1871, congress made this state corporation, with that state authority, one of its agencies in the establishment of the national highway provided for, and authorized it—"Subject to the laws of California, to construct a line of railroad from a point at or near Tehachapa pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six," (with the proviso already quoted.)

Here was not only a plain recognition by congress that the Southern Pacific Railroad Company of California, existing at the time of the grant of March 3, 1871, under the articles of amalgamation and consolidation of October 11, 1870, was the same Southern Pacific Railroad Company to which the grant of July 27, 1866, was made, but the authority to build the road designated conferred on that company by the act of March 3, 1871, was in terms made subject to the laws of California. Those laws, as has already been pointed out, not only authorized two or more railroad corporations to amalgamate and consolidate their interests and to amend their articles of incorporation, but the state act of April 4, 1870, expressly declared that the powers therein conferred upon the Southern Pacific Railroad Company, its successors and assigns, were for the very purpose of enabling it, its successors and assigns, to more fully and completely comply with and perform the requirements, provisions and conditions of the act of congress of July 27, 1866, and any other act or acts of congress that might be thereafter enacted.

Pursuant to this state authority, recognized by and made a part of the congressional grant of March 3, 1871, the Southern Pacific Railroad Company, on the 15th of April, 1871, filed in the proper office of the state amended articles of incorporation, and, on the 12th of August, 1873, it filed, together with

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the Southern Pacific Branch Railroad Company, articles of amalgamation and consolidation under the name of the "Southern Pacific Railroad Company," in both of which articles one of the purposes is stated to be the building of the line from San Francisco through the several named counties, in a southeasterly direction, to the Colorado river, and the building of the line from Tehachapa pass by way of Los Angeles, to connect with the Texas Pacific at or near the Colorado river, and thus to secure to itself the grants, rights and privileges conferred upon it by the congressional grants.

Amended articles of incorporation.

While by the several articles of amalgamation and consolidation, a new corporation, in one sense, was formed, each

Identity of company which built road and to which grant was made.

was substantially and practically the same Southern Pacific Railroad Company mentioned in the acts of congress, and had for its main purpose the building of the lines of railroad therein designated and the obtaining of the land grants for doing so. Congress, in passing the act of March 3, 1871, evidently did not consider that the Southern Pacific Railroad Company, by entering into the articles of amalgamation and consolidation of October 11, 1870, and thereby, in one sense, becoming a "new" corporation, had become a distinct and independent one; for in that very act it designated the Southern Pacific Railroad Company to which that act applied as the same Southern Pacific Railroad Company to which the act of July 27, 1866, applied. Not only so, but the act of March 3, 1871, in terms authorized that company to build the designated road subject to the laws of California, which laws, as has been shown, expressly authorized the amalgamations and consolidations and the amendments of articles that were made. There was therefore congressional as well as state legislation authorizing the articles of amendment, amalgamation and consolidation, and I can see no just ground for holding that the defendant company, which it is conceded built the required road within the designated time, was not the company to which the grant was made.

In other ways, also, the defendant company has been recognized as the Southern Pacific Railroad Company to which the act of March 3, 1871, applies. It has been so recognized by the appointment of commissioners from time to time as the road was being built, to report in regard to its construction; by the acceptance of the road by the president, in its entirety, as having been duly completed under and by authority of the act, and by the use of the road by the government in the transportation of its mail, military stores, etc., pursuant to the provisions of the act. Manifestly, the defendant com-

pany cannot justly be held subject to the burdens imposed by the act and yet not entitled to the benefits conferred by it as a consideration for those burdens.

Besides, as said by Judge SAWYER, in the case of *Southern Pac. R. Co. v. Poole*, *supra*: "Section 2 of the Atlantic and Pacific act, imported into the Texas and Pacific act by virtue of section 23 of the latter and section 18 of the former, giving to the Southern Pacific Railroad Company of California 'the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions' prescribed in the former act, expressly says the lands are granted to the company, its successors and assigns. These words 'successors and assigns' of course mean something. If the consolidated company, with amended articles of incorporation, is not technically the same corporation referred to in the Texas Pacific act, it is substantially and practically so. If not, it is certainly its successor or assign, and is thus within the express provisions of the grant."

The points above considered are common to all of the cases, and dispose of case No. 88. In the consolidated cases Nos. 67, 68 and 69 the question in respect to the Mexican grant San Jose remains to be determined.

That grant was for the place called San Jose and in conformity with the deseno attached to the petition for the grant and within the boundaries therein given. The grant was made by Juan B. Alvarado, at the time governor of Upper California under the Mexican government, and received the approval of the departmental assembly. The claim thereto was presented in September, 1852, by the grantees to the board of land commissioners pursuant to the provisions of the act of congress of March 3, 1851, entitled "Act to ascertain and settle the private land claims in the state of California," (9 St. at Large, 631.) The claim was confirmed by the board of land commissioners, and in December, 1854, the district court, to which the case had been taken on appeal, confirmed the decrees of the board, giving to each of the three claimants an equal undivided one-third part. "Of the lands of San Jose granted by Juan B. Alvarado, governor of California, to Ignacio Palomares and Ricardo Vejar on April 15, 1837, and regranted by said governor on March 14, 1840, to said Palomares and Vejar and to Louis Arenas, as described in the grant first mentioned and the map to which the same referred, and which boundaries fully appear from the act of judicial possession [described as follows:] 'Commencing at the foot of a black willow tree which was taken for a corner and between the limbs of which a dry stick was placed in the form of a cross;

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thence westerly nine thousand seven hundred (9,700) varas to the foot of the hills called "Las Lomas de la Puente" taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from the said San Jose to the Puente, making a cut (caldura) on one of the limbs with a hatchet; thence northerly ten thousand four hundred (10,400) varas to the creek (arroyo) of San Jose opposite a high hill where a large oak was taken as a boundary, in which was placed the head of a beef, and some of its limbs chopped; thence easterly ten thousand six hundred (10,600) varas to the creek (arroyo) of San Antonio, taking for a landmark two young cotton-woods which stand near each other, on the bark of which crosses were made; thence southerly nine thousand seven hundred (9,700) varas to the place of beginning."

The decree of the district court became final in 1857. In 1858 the surveyor general for California caused the land thus granted and confirmed to be surveyed,—the survey being made by Deputy Surveyor Hancock. That survey did not include any portion of the lands in controversy here. It was approved by the surveyor general for California on the 14th of January, 1860; but the case shows that it did not receive the approval of the commissioner of the general land office.

On the 14th of June, 1860, congress passed an act entitled "An act to amend an act entitled 'An act to define and regulate the jurisdiction of the district courts of the United States in California in regard to the survey and location of confirmed private land claims,'" (12 St. at Large, 33,) by which the district courts were given authority to order into court for examination and adjudication the survey of such private claims. This act, however, as was held by the supreme court, did not apply to surveys made prior to its passage unless they had been approved by the surveyor general and had been "at the time of the passage of the act returned into the district court, or in relation to which proceedings were then pending for the purpose of contesting or reforming the same."

The grant claimants were not satisfied with the Hancock survey, and subsequent to the passage of the act of June 14, 1860, brought it before the district court for review, in supposed conformity with the provisions of that act; but that court finding that the act did not apply to that survey, on November 21, 1867, dismissed the proceedings and remitted the papers to the surveyor general. In the mean time congress had passed the acts of July 1, 1864, (13 St. chap. 194,) and July 23, 1866, (14 St. 220.) The act of July 1, 1864, was entitled "An act to expedite the settlement of titles to lands in the state of California," and by its sixth section provided that it should be the duty of the surveyor general for Cali-

fornia to cause all private land claims finally confirmed to be accurately surveyed and plats thereof to be made whenever required by the claimants; provided, that each claimant requesting a survey and plat should first deposit in the district court of the district within which the land was situated a sufficient sum of money to pay the expenses of such survey and plat, and of the publication required by the first section of the act.

The act of July 23, 1866, was entitled "An act to quiet land titles in California," the eighth section of which provided: "That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, to expedite the settlement of titles to lands in the state of California, and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such lands; and he shall set off, in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree; and all the land not included in such grant as so set off shall be subject to the general laws of the United States; provided, that nothing in this act shall be construed so as in any manner to interfere with the right of *bona fide* pre-emption claimants."

On the 9th of January, 1868, the surveyor general for California reported to the commissioner of the general land office that an application had been made to him by one of the grant claimants for a survey of the grant, and in response to that report the commissioner directed that the Hancock survey, made in 1858, and approved by the surveyor general January 4, 1860, be published in accordance with the provisions of the act of congress of July 1, 1864. Instead of doing so, the surveyor general, it seems, caused another survey of the grant to be made in August of that year, to-wit, 1868, by Deputy Surveyor Thompson, which survey included a portion of the lands involved in cases 67, 68 and 69, and was approved by the surveyor general.

Both the Hancock and Thompson surveys were subsequently before the commissioner and afterwards before the secretary of the interior for consideration and decision—the claimants contending that the lines of the Thompson survey correctly represented the lines of the grant; and the question of survey was so pending at the time of the grant to the Southern Pacific Railroad Company of March 3, 1871. That question, as the record shows, related to the true location of the natural calls of the grant, and was finally determined by the secretary September 20, 1872, by which decision the lines as represented by the Thompson survey were rejected and those of the Hancock survey, with some modifications, adopted—the direction of the secretary being: “That the lines of the survey of San Jose be run as follows: Commencing at the willow at the southeast corner, at the point designated by Hancock as ‘large rock in center of water pool, agreed on as the place where the black willow of the juridical possession once existed;’ thence westerly along the base of the mountains, so as to include the springs near the ravine, to the black walnut; thence northerly to the oak of the Tueaja; thence northeasterly to the Botello oak; thence easterly in a direct line to a point on the arroyo of San Antonio, 9,700 varas north of the black willow, and thence southerly along said arroyo of San Antonio to the place of beginning.”

In accordance with these instructions another survey of the grant was made by the surveyor general, upon which a patent was issued; and as thus surveyed and patented none of the lands in controversy were included in the lines of the grant.

While the final result of these proceedings was a conclusive determination that as a matter of fact none of the lands in controversy ever were within the true lines of the San Jose grant, they also show beyond doubt that some of them were claimed by the grant claimants to be within the boundaries of that grant, and that such claim was made and maintained at the time of the congressional grant to the Southern Pacific Railroad Company of March, 3, 1871.

It is contended that the surveyor general had no authority to cause the Thompson survey to be made while the previous survey of Hancock was pending and undetermined, and that the Thompson survey was never considered by the commissioner of the general land-office or the secretary of the interior “as a survey but only as an exhibit.”

Let all of this be admitted, and the fact that is determinative of the question as to whether the lands in controversy here were embraced by the grant to the Southern Pacific Railroad Company of March 3, 1871, remains the same. Considered only as an “exhibit,” the Thompson survey, repre-

senting as it did what the claimants contended were the true lines of the grant, was and is evidence of the fact that they claimed that the lands embraced by that survey (including a portion of the lands in controversy here) were within the boundaries of the Mexican grant; and that claim was asserted up to the time of the final decision of the secretary of the interior in September, 1872. It is not the validity of such claim, but the fact that it was made, that excludes the lands embraced by it from the category of public lands within the meaning of the railroad land grants, if excluded at all. *Doolan v. Carr*, 125 U. S. 632.

It is urged that because the San Jose was a grant by specific boundaries and was confirmed with the same boundaries, no land that was not finally ascertained by the land department to be within those boundaries is excluded from the railroad grant, if otherwise within its limits. This is practically to wipe out entirely the doctrine announced by the supreme court in *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 638, and in other cases, that the status of lands included in a Spanish or Mexican claim pending before tribunals charged with the duty of adjudicating it was such that they were not included in the phrase "public lands" of the railroad land grants. "Those Mexican claims," said the court in *Doolan v. Carr*, "were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger out-boundaries, and they were frequently described by the name of a place or ranch. To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within out-boundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government, which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located."

U. S. Supreme
Court deci-
sions.

In the case of *U. S. v. McLaughlin*, 127 U. S. 428, it was held, that as in the case of a floating grant the Mexican government retained the right to locate the quantity granted in such part of the larger tract described as it saw fit, and as the government of the United States succeeded to the same right, the latter government might dispose of any specific tracts within the exterior limits of the grant, provided a suf-

ficient quantity was left therein to satisfy the private grant; and, accordingly, that in cases of floats, the railroad land grants might attach to lands within such exterior boundaries provided a sufficient quantity of land was left therein to satisfy the private grant. But while thus modifying what was generally understood to have been the effect of the decision in *Newhall v. Sanger*, the court, in *U. S. v. McLaughlin*, proceeded to declare (127 U. S. 455) that "the reasoning of the court in *Newhall v. Sanger* is entirely conclusive as to all definite grants which identified the land granted, such as the case before it then appeared to be," but went on to show that it was not fairly applicable to floats.

I do not see how there can well be a decision more directly to the point that in cases of Mexican grants by specific boundaries, lands which are claimed by the grantees to be within those boundaries are excluded from the category of public lands to which the railroad land grants apply, if at the date of the latter the question of the true location of the boundaries of the private grant is pending and undetermined. If to such a case the doctrine of *Newhall v. Sanger*, and the other cases approving it, does not apply, it does not apply to any case; for it does not apply to floats, as was pointed out in *U. S. v. McLaughlin*, and grants by specific boundaries and by name manifestly stand upon the same footing.

It is contended that as the San Jose grant was one by specific boundaries the claim ceased to be *sub judice* when the decree of confirmation became final in 1857; that nothing then remained to do but apply the description to the ground and survey the lines. If so, precisely the same thing is true in respect to floats. When the decree of confirmation in such a case became final, nothing remained to do but locate the quantity and survey the lines. In either case, that duty, except in the matter of such surveys as came within the provisions of the act of congress of June 14, 1860, devolved upon the land department of the government and was subject, first, to the action of the surveyor general, and then, in turn, to that of the commissioner of the general land-office and the secretary of the interior. The records of the land department put in evidence in these cases clearly show that the contest over the survey of the San Jose grant was in relation to the identity of the natural calls of the grant—the grantees claiming that the true location of the trees and other objects called for in the specific description of the grant would include within those boundaries a portion of the lands in controversy here. If that contention was well founded, undoubtedly the lands so included would not be public lands of the United States.

When grants
cease to be sub
judice.

It would seem plain enough, therefore, that until that question was finally decided it could not be known whether the lands so claimed were public lands or not. Under the laws of the United States the duty of deciding that question devolved, as has been said, upon the officers of the land department. Its ultimate determination was vested in the secretary of the interior. Had he decided that the lines as represented by the Thompson survey were the true boundaries of the grant, such decision would of course have been equally conclusive as the one that was made; and the patent following it would have been a conclusive determination that all the lands embraced within those lines were within the boundaries of the Mexican grant and therefore not public lands to which the railroad grant only could attach. It would seem plain, therefore, that until the contested question of survey was decided it could not be known whether the lands involved in the contest were public or private lands; and until such decision became final, lands so involved were *sub judice* and not public lands within the meaning of the railroad grant act, according to the ruling in the cases referred to, as I understand them.

It results from these views that in case No. 88 there should be a decree dismissing the bill without costs, and in the consolidated cases Nos. 67, 68 and 69 a decree in favor of complainant in so far as concerns the tracts of land in controversy which were at the time of the grant to the Southern Pacific Railroad Company of March 3, 1871, within the claimed limits of the San Jose grant, and as concerns the remainder of the lands in controversy in the consolidated cases, a decree for the defendants—each party to pay its own costs.

SAWYER, J.—After a careful consideration of the question, I am satisfied that those lands embraced in cases Nos. 67, 68 and 69, alleged to have been within the boundary of the rancho San Jose, and to have been *sub judice*, at the date when the railroad grant attached to the lands granted, were subject to the legislative grant. I have studied with great care the cases of *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 638; and *U. S. v. McLaughlin*, 127 U. S. 428, relied on, and I am unable to find anything in either of them requiring, or justifying, the exclusion of those lands from the operation of the grant. In my judgment, those lands, now in question, were not in any just sense, or in the sense contemplated in the decisions in those cases, *sub judice*, at any time after the decree of confirmation, defining by specific metes and bounds, the precise lands confirmed, became final, even if they were so, which is at least, doubtful, at any prior time. That decree

San Jose lands
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pointing out, specifically, the precise lands confirmed, forever settled the rights of the parties, and after it became final, there was no possible ground for claiming anything outside of those boundaries. None of these lands are within the boundaries designated in the decree, or within the exterior boundary of the juridical possession upon which the decree was based. Indeed, as I understand the matter, they all lie from at least one to three miles from those boundaries, and could not by any possibility have been taken in by any survey, conforming to the decree, or have been lawfully included in any survey. After that decree became final the claimants might just as well have claimed land ten, fifteen or more miles, as from one to three miles, distant. The decree settled the rights of the parties, and the limits of the land granted. And that is final. It could not, lawfully, be changed by the surveyor, or any other authority. In the language of the supreme court, in *U. S. v. Halleck*, 1 Wall. (U. S.), 455, 456: "The decree is a finality, not only on the question of title, but as to the boundaries which it specifies." Affirmed: *U. S. v. Billing*, 2 Wall. (U. S.), 448; *Higuera v. U. S.*, 5 Wall. (U. S.), 834; *Dodge v. Perez*, 2 Sawy. (U. S.), 652.

In the *Fossat Case*, 2 Wall. (U. S.), 649, the supreme court held that: "If a California land claim has been confirmed by a decision of the district court under the act of March 3, 1851, and decision of confirmation, fixing the boundaries of the tract, stands unreversed, a survey under it is the execution of that decree, and must conform to it in all respects."

Now in this case, the decree of confirmation which stands unreversed "fixes the boundaries" of the grant, and the survey under it is not a continuation of the litigation, but "the execution of that decree;" and no lands outside the specific boundaries so fixed and established, no matter what the confirmees may claim, could, lawfully, be included in the survey, or patent. The rights of the parties are, finally, settled, and the land to which the confirmees are entitled, irrevocably, designated, and, distinctly, pointed out.

The language of the decree of confirmation is, substantially, identical with that of the juridical possession, which was ratified and approved by the granting authorities of Mexico, and by its adoption in the decree by the courts of the United States, it, forever, settled the question of location between the United States and the claimants, and, thereby, the lands outside the boundaries ceased to be *sub judice*. All that remained to be done was to execute the decree, by finding the monuments designated, and run the lines between them in a form usual for insertion in United States patents. There was no discretion whatever left in the surveyor, as there is in the

case of a float. Those monuments, and no others, could be lawfully taken, and there was no possible ground for further claiming lands outside the boundaries so, specifically, designated, and pointed out. The language of the decree of confirmation is clear and unmistakable, and is as follows:

"Commencing at the foot of a black willow tree, which was taken for a corner, and between the limbs of which a dry stick was placed, in the form of a cross; thence westerly nine thousand, seven hundred (9,700) varas to the foot of the hills called 'Las Lomas de la Puente,' taking for a landmark a large walnut tree on the slope of a small hill on the side of the road which passes from said 'San Jose' to the Puente, making a cut (caldura) on one of the limbs with a hatchet; thence northerly ten thousand, four hundred (10,400) varas to the creek (arroyo) of San Jose, opposite a high hill, where a large oak was taken as a boundary, in which was placed the head of a beef, and some of its limbs chopped; thence easterly ten thousand, six hundred (10,600) varas to the creek (arroyo) of San Antonio, taking for a landmark two young cotton-woods which stand near each other, on the bark of which crosses were made; thence southerly nine thousand, seven hundred (9,700) varas to the place of beginning."

There could not well be a more specific description of the corners and landmarks. There are four corners, consisting of certain trees, marked and carefully described, constituting the monuments as specifically described, as surveyors usually describe the monuments; and four straight lines for sides, forming very nearly a parallelogram; and such appears to be the shape of the land on the *deseno*. No other points or objects could be lawfully taken. Now the land included within these boundaries is the land confirmed, and no other. There was no further ground for litigation. All that was necessary to do was to find the monuments and run the connecting lines according to the description in the decree. Monuments of this kind may be destroyed, and it may become difficult to find them; but that is the misfortune of the parties interested. It does not appear that that was the case here. Monuments are often destroyed when planted by government surveyors in surveying the public lands, and this occasions much trouble in after years, as this court has had frequent occasion to know, from litigation before it, as to boundaries of the public surveys and the location of the monuments, officially planted by the United States surveyors.

In this case the record of the juridical possession was referred to in, and made a part of, the petition for confirmation filed before the land commissioners, as describing the lands for which confirmation was asked. Thus the claim made

upon the record was for these specific lands within the boundaries prescribed by the juridical possession, and adopted in the final decree, and no other. It does not appear in the record that any claim was made before the board or court for lands outside these boundaries, or that there ever was any contest over lands outside the prescribed boundaries. The juridical possession was a ceremony analogous to livery of seisin at common law, and it defines specifically the lands granted. This juridical possession is, of itself, controlling as to the lands granted. *Graham v. U. S.*, 4 Wall. (U. S.), 261, 262; *U. S. v. Pico*, 5 Wall. (U. S.), 539, 540. In this case we have not only the juridical possession, but the decree confirming the grant in accordance with it, and with the claim of the petitioners, as shown by the record; and this decree, whether right or wrong, as we have seen, is final and conclusive. The case was not open, thereafter, to further contest, or claim for lands outside these boundaries. In my judgment, that claim for land outside ceased to be *sub judice*, if it ever was in that condition, at the date when this decree became final. After that no land outside of these prescribed boundaries could, lawfully, be included in the patent issued under the confirmation; and there was no longer any legitimate, or substantial, basis for any claim to such lands.

Newhall v. Sanger, 92 U. S. 761, and *Doolan v. Carr*, 125 U. S. 618, present cases entirely different from this. In the former, when the general map of the route was filed by the railroad company the claim for confirmation of the Moquelamos grant, within the exterior boundaries of which the lands in dispute were situated, was still pending and undetermined. The grant was afterwards rejected as fraudulent. The claim itself to the grant was, undoubtedly, *sub judice*, for it was still pending, and the validity of the claim undetermined by the courts. It was held that the grant being still *sub judice* the lands were not embraced within the railroad grant. The case was decided upon a partial record in which all the facts did not appear. Afterwards, in *U. S. v. McLaughlin*, it appeared that the land claimed under the Mexican grant was for a certain number of leagues within exterior boundaries containing a great many more leagues,—a float: and it was held that, since there was ample land left to satisfy the grant, and the right of location was in the government, the surplus lands were subject to grant, and those within the purview of the railroad grant passed to the railroad company; and the court limited the rule as to lands *sub judice*, at the time of the railroad grant, to grants by name and grants by specific boundaries, in which all the lands passed to the grantee. *U. S. v. McLaughlin*, 127 U. S. 428.

So the case of *Doolan v. Carr*, 125 U. S. 618, did not present all the facts, and the court acted upon the hypothesis that the grant was one by name,—the “*Rancho Las Pocitas*” including all the lands within the indicated boundaries. It was substantially so alleged in the offer of proof (see p. 621, 125 U. S.,) and such is the idea conveyed by the proofs offered as stated on pages 622 and 623. It does not appear in that record that the supreme court modified, as it did the decrees of the board and of the district court; and limited the confirmation to two square leagues, or that the exterior boundaries covered from ten to twelve square leagues,—that it was, therefore, in fact, a mere float, a grant of quantity, within boundaries containing nearly six times the quantity confirmed. But all this appears in the subsequent case, involving lands in the same grant “*Las Pocitas*,” *U. S. v. Curtner*, 38 Fed. Rep. 1, and 14 Sawy. (U. S.), 535, the decision in which was concurred in by both the circuit justice and circuit judge,—the former, with Justice STRONG, having originally dissented in *Newhall v. Sanger*. The court in *Newhall v. Sanger* doubtless supposed that the grant called “*Moquelamos*” was a grant by name, with definite boundaries. This clearly appears from what is said in *U. S. v. McLaughlin*, 127 U. S. 455, 456. Said the court among other things: “There is really nothing in the decision of *Newhall v. Sanger*, in conflict with the views here expressed, because the court did not have before it the case of a floating grant,” page 456, 127 U. S. And in that case, the validity of the grant itself had not been decided when the railroad grant was alleged to have attached. And in *Doolan v. Carr* the court supposed that “*Las Pocitas*” was a grant by name, including all land within the boundaries given, and acting upon this idea, as seems evident from what it said in 125 U. S. 631 and 632, and in the third head-note, pages 118, 119, it considered, and perhaps, properly, too, the case to be still *sub judice* under its loose and extremely vague general boundaries as described, until they should be properly and specifically determined. The boundaries in both these cases were general, loose and vague to the last degree, and much latitude in the exercise of discretion by the surveyor, must, necessarily, have been exercised. In those cases, until the survey had been made and approved, and the land granted located, the case was, perhaps, *sub judice*. The San Jose grant, now under consideration, presents no such case. It had been awarded to the claimants as long ago as 1857, by a final decree, which not only confirmed the grant, but pointed out the boundaries by specific corners, carefully described, and courses connecting them, which no surveyor could lawfully disregard, change or modify; and I find noth-

ing in the cases cited to warrant me in saying, that, after that specific decree became final, either the grant or its boundaries were in any just or legal sense, or in the sense as used in the cases cited, *sub judice*. The grant was undoubtedly *sub judice*, from the filing of the petition, till the entry of the final decree confirming and identifying the lands granted by specific metes, bounds and monuments, clearly described.

Prior to the entry of that decree confirming the grant, like that in question, the grant to the railroad company under the decisions in the cases cited, would not have taken effect, even if the grant were afterwards rejected as fraudulent, upon lands confessedly within the specific boundaries of the grant as described and claimed in the petition, it being a grant covering all the lands within the boundaries. But these lands now under consideration never were within the boundaries described in the juridical possession, for which the petition was filed, and in the final decree, which follows literally the juridical possession. Like much of the land claimed to be within the Moquelamos grant, these lands were entirely outside the exterior boundaries of the grant. I doubt very much whether they ever were *sub judice*, although the lands described in the grant undoubtedly were. They were miles outside the boundaries described in the juridical possession and decree, and could in no way be lawfully brought within the grant. In *U. S. v. McLaughlin* the main question was, "Whether the land in question was actually within the outside limits of the pretended Moquelamos grant?" 127 U. S. 441. Had it not been, as a large part was found by the court not to be, although so earnestly and vigorously claimed, that ended the question. Now, in this case, the lands under consideration never were within the outside limits of the grant, as indicated by the juridical possession, and that ought to end the matter.

But the supreme court itself, in the case of *U. S. v. McLaughlin*, the very last case on the subject, has decided the point, substantially, that the mere claim that lands are within the boundaries of a grant does not make them *sub judice* even in a float, within the meaning of that phrase, as used by the court in the three cases cited. That decision authoritatively settles the point, and does not leave it open for further discussion. Nearly all the lands involved in that suit lay east of the Jack Tone road, which followed the line between sections 7 and 8. The complainants earnestly insisted that the eastern boundary of the Moquelamos grant was the Sierra Nevada range, 80 miles distant, and if not that range, then, that Bear mountain, 24 miles east of the Jack Tone road, was the narrowest eastern limit of the grant. The most of the

testimony in that case, both by complainants and respondents, was introduced upon this single point to show the eastern exterior boundary of the grant, the complainants insisting that it was the Sierra Nevada range, and if not, that, then, at least, Bear mountain, and the respondents, that it was the Jack Tone road. And the court opens the discussion on page 441, 127 U. S., by saying that the first question is, "Whether the land in question was actually within the outside limits of the pretended Moquelamos grant?" Several pages are then devoted to discussing the evidence on this point, which was the great point of discussion in the case, and the court then concludes: "On the whole, we are satisfied that the outside boundary limits of the Moquelamos grant, as called for in the grant itself, do not extend east of the Jack Tone road, or the edge of the hills commencing near the same. This result would dispose of the present case with regard to nearly all the land, in question therein," pp. 447, 448, 127 U. S.

Thus, as to the great body of lands in question, the court put the decision expressly on the ground, that although within the boundaries, as claimed, they were, in fact, outside the real boundaries of the grant.

Then, the mere claim that the lands were within the boundaries of the grant did not make them *sub judice*, within the meaning of that term, as used by the court; for this point is wholly outside and independent of the distinction between floats and grants by specific boundaries or names, on which distinction the few lands west of the Jack Tone road were still given by the court to the railroad company as not coming within the decision of *Newhall v. Sanger*. It seems to me that there is no evading this authoritative decision; that a mere claim that lands are within the exterior boundaries of a grant, when not so in fact, does not make them *sub judice* even in the case of a float, much less in a grant with specific bounds, finally and irrevocably confirmed and fixed by such specific bounds.

I am, therefore, clearly of the opinion that these lands now under consideration were not *sub judice* in the sense as the terms are used in the cases cited when the railroad grant attached, and that the grant is valid and passed a good title.

On this point I regret to find that I cannot agree with my associate. On all the other points discussed by my associate, in the opinion now delivered, I fully concur with his views.

It has been suggested that the ruling on demurrer as to indemnity lands adopted in the opinion of my associate in which I concur, and being the lands in question, is inconsistent with the ruling in *Southern Pac. R. Co. v. Wiggs*, de-

cided by me, and reported in 43 Fed. Rep. 333, and 14 Sawy. (U. S.) 568. When that case was decided the decision on demurrer in this case had not fallen under my notice. But the cases are not inconsistent and can well stand together. In that case the decision was not put upon the ground that the company's title attached to lieu lands at any time before the selection, but on the ground that under the special provision of that act they, as well as those within the primary grant, were withdrawn from pre-emption, and other disposition before provided for by law, and that, although the company's title did not vest, till selection, still that, until it had an opportunity to select, nobody else could acquire or initiate a pre-emption or other right, under existing laws. And that the pre-emption claim then in question was initiated and afterwards proved up and the patent issued, while the lands were withdrawn and not subject to sale as the laws then stood, except to the company, and while awaiting an opportunity for the company to select, and were not then subject to such disposition. Congress had power, had it seen fit to do so, to withdraw any lands from pre-emption without reference to other grants, and without conferring any rights upon another to the lands. But that act did not purport or attempt, nor could it have done so if attempted, to limit the power of congress to make subsequent grants to such lands before any other right in them had vested; and the grant now in question was a subsequent one made by congress itself, and as no other right had yet attached to the lands, it was in no way affected by the provisions for withdrawal from pre-emption and sale by the prior act. I concur with the district judge wherein he held on demurrer as follows:

"To lands to which no title could attach prior to selection, I do not think the Atlantic & Pacific Company had, at the time of the grant to the Southern Pacific Company, a present, or prospective right. If it had such right to the particular lands in suit, it had the same right to all other lands to which the right of selection might have applied. And since, by the act making the grant, the Atlantic & Pacific Company was empowered to construct its road along the thirty-fifth parallel of latitude to the Colorado river 'at such point as may be selected by the company for crossing, thence by the most practicable and eligible route to the Pacific' ocean, the present and prospective right of that company, prior to selection, might be applied to any public land situated between the Colorado river and the Pacific ocean with equal propriety as to the particular lands in controversy here. The effect of such a holding would be to give the proviso as broad a scope as the granting clause to which it is appended."

The question whether the clause in the provision of section 23 in the act of 1871, "that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company," or any clause in the act of 1866, in view of all the facts of the case, defeats the grant to respondent as to those lands, which lie within the primary limits of the grant, does not arise in this case, and, therefore, need not be discussed. Yet, since there is an intimation, in the opinion of the district judge, upon the demurrer, although the question was not involved, and, consequently, there was but a partial consideration of the point, that such is the case, I refer to it now for the purpose, only, of saying that I do not wish to be considered as acquiescing in that view. I shall not at this time decide or discuss that question, but leave it for full discussion and decision when the point properly arises.

Under the views expressed, and those of my associate on the other points discussed by him, in which I have concurred, and under the provisions of section 650 of the revised statutes of the United States, the bills, as to all the lands involved in the several cases before us, must be dismissed, and it is so ordered.

NORTHERN PACIFIC R. CO.

v.

CANNON *et al.*

(*U.S. Circuit Court, D. Montana, April 6, 1891, 46 Fed. Rep. 224.*)

Land Grant—When Title Vests in Company.—The title of the Northern Pacific R. Co., to the lands granted it by the Act of Congress of July 2, 1864, in aid of the construction of its railroad, vested in the company upon the designation by it of the route of its road, irrespective of the fact that no patent had been issued therefor.

Same—Bill to Establish Title—Possession Necessary.—Actual possession of land is necessary in order to maintain a bill to establish the legal title of the party in whom it is vested. Accordingly, where a railroad company has the legal title to lands granted it by the United States, but is not in possession, a bill to determine the adverse claim of a party holding the land under an invalid patent issued pursuant to an entry of the land as a mining claim, where it was valuable only for agricultural purposes, is demurrable, as failing to show ground for equitable relief.

IN EQUITY. On demurrer to bill.

Cullen, Sanders & Shelton and F. M. Dudley, for plaintiff.
M. Bullard and Toole & Wallace, for defendants.

KNOWLES, J.—The plaintiff sets forth in its bill of complaint filed herein that it received a grant from the United States by virtue of an act dated July 2, 1864, on the line of its railroad to certain lands. There is set forth therein all the acts required of plaintiff in order to designate and vest in plaintiff the title to the lands granted by said act; that the land hereinafter named was, at the date of said grant, and at the date it fixed the general route of its railroad, public land belonging to the United States, free from any claims or rights whatever, and agricultural land; that the land herein described was within the limits of plaintiff's grant, upon an odd section, to-wit, the S. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, of § 29, in township 10 N., range 3 W., of the principal meridian of Montana; that about the 9th day of February, 1880, the said Catherine B. Cannon made application to patent said premises as mineral lands, and, with the view of defrauding plaintiff, the said defendants C. W. Cannon and Catherine B. Cannon falsely and fraudulently represented to the officers of the United States land-office that the same was mineral land, and introduced false testimony and affidavits to support said application in said office; that on or about the 18th day of October, 1881, the said United States land-office issued to the said Catherine B. Cannon a patent from the United States to said premises as mineral land; that the said patent is a cloud upon plaintiff's title, and prevents it from receiving a patent to said premises to which it is entitled. The principal prayer in said bill is: "And your orator prays that your honors may decree that the said defendants have no estate or interest whatever in or to said lands or premises, and that the title of your orator is good and valid, and that the said defendants, and each of them, be forever enjoined and restrained from asserting any claim whatsoever in and to said lands and premises adverse to your orator, and for such other and further relief as the equity of the case may require, and to your honors may seem meet."

The only allegation as to the possession of said premises is as follows: "And your orator further shows on its information and belief that such premises have been vacant, unoccupied, unfenced, and unimproved, and not used for any purposes, until within less than five years prior to the commencement of this action."

To this bill of complaint all the defendants but Mrs. Walker demur. The first ground of demurrer is "that it appears by the plaintiff's own showing in the said bill that the said plaintiff is not entitled to the relief prayed by the bill against these

defendants." There are many other grounds stated in the demurrer, but the only one which will be noticed is as to whether the bill states facts sufficient to show that the case is within the equity jurisdiction of this court, and in considering this the first question presented is, what is the nature of the title of the Northern Pacific Railroad Company to the lands embraced within its grant? Is it a legal or an equitable one? It fully appears that it has no patent for the lands specified in this bill. In considering this question I am much perplexed, for it appears to me there are two lines of decisions upon this point, one of which holds that its title is a legal one, the other that it is an equitable one. The grant of lands to the Union Pacific Railroad Company is similar to that to the Northern Pacific Railroad Company. It has been held by decisions of the supreme court that as to the granting of lands they are in substance the same. In the case of *Kansas Pac. R. Co. v. Prescott*, 16 Wall. 608, the supreme court says: "As the government retains the legal title until the company, or some one interested in the same grant or title, shall pay these expenses, the state cannot levy taxes on the land, and, under such levy, sell and make titles which might in any event defeat this right of the federal government, reserved in the act by which the inchoate grant was made."

Legal title
vested in com-
pany—De-
cisions re-
viewed.

In the case of *Union Pac. R. Co. v. McShane*, 22 Wall. 444, the same court uses this language: "That the payment of these costs of surveying the land is a condition precedent to the right to receive the title from the government can admit of no doubt. Until this is done, the equitable title of the company is incomplete. There remains a payment to be made to perfect it."

Again: "The United States retains the legal title by withholding the patent, for the purpose of securing the payment of these expenses, and it cannot be permitted to the states to defeat or embarrass this right by a sale of the land for taxes."

In the case of *Northern Pac. R. Co. v. Traill Co.*, 115 U. S. 600, 25 Am. & Eng. R. Cas. 364, the same court again consider this same question in connection with the grant now under consideration, and held: "The United States made a magnificent grant to this company of lands equal to forty or fifty thousand square miles, an area as large as an average state of the Union. It thought proper to require of the grantee the payment of the costs of making the surveys necessary to the location and ascertainment of these lands. To secure the payment of these expenses, it decided to retain the legal title in its own hands until they were paid. The government was as to these costs in the condition of a trustee in a convey-

ance to secure payment of money ; but, if the land was liable to be sold for taxes due to state, territorial, or county organizations, this security would be easily lost."

In this case the supreme court held that the statute passed in 1870 upon the subject of the Northern Pacific Railroad Company's paying for the costs of surveying the lands within its grant placed it in the same condition as the Union Pacific Railroad Company and the Kansas Pacific Railroad Company, so far as its land grant was concerned. This statute of 1870 is as follows: "That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest." 16 U. S. St. at Large, 305.

This statute, the supreme court holds, is in substance the same as § 21 of the act of 1864, concerning the grant of lands to the Union Pacific Company, which reads as follows: "That before any lands granted by this act shall be conveyed to any company or party entitled thereto * * * there shall first be paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or party in interest, as the titles shall be required by said company." 13 U. S. St. 365.

In effect it would appear that these two statutes are the same; and the three decisions construing the grants to the Kansas Pacific, Union Pacific, and Northern Pacific Railroad Companies arrive at the same conclusion: That the title in these companies to their lands is an equitable one; that, until these costs of surveying and conveying the same are paid, the railroad companies have not a complete equitable title even to their land. *Northern Pac. R. Co. v. Traill Co.*, *supra*. If I understand correctly the purport of the decisions in the case of *New Orleans Pacific R. Co. v. United States*, 124 U. S. 124, 33 Am. & Eng. R. Cas. 74, the same doctrine is maintained.

I come now to consider the other line of decisions which appear to me to maintain the view that the legal title to the land granted to these several railroad companies is in them. In the case of *Schulenberg v. Harriman*, 21 Wall. 44, the supreme court held that the words in the act granting land to the state of Wisconsin for railroad purposes, "that there be, and is hereby, granted," imply the present granting of the title in fee. Sustaining this view are: *Leavenworth L. & G. R. Co. v. United States*, 92 U. S. 741; *Missouri, etc., R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; and *Wood v. Burlington & M. R. R. Co.*, 104 U. S. 329, 10 Am. & Eng. R. Cas. 611.

In the case of *Buttz v. Northern Pac. R. Co.*, 119 U. S. 66, 29 Am. & Eng. R. Cas. 455, the supreme court, upon this subject, uses this language: "At the time the act of July 2, 1864, was passed the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the government. The grant conveyed the fee, subject to this right of occupancy."

In *Denny v. Dodson*, 13 Sawy. 66-75, 32 Fed. Rep. 899, Justice FIELD, sitting as circuit justice, after referring to some of the decisions cited as to the grant being one *in presenti*, said: "The present title here mentioned is a legal title, as distinguished from an equitable or inchoate interest arising upon a contract or promise of the government. The words 'there be, and is hereby, granted' are not words of contract or promise, but, as said in the citations, are words of absolute donation; that is, they transfer a present legal right to the sections designated, which become attached to them specifically whenever they are identified."

In this case that eminent jurist stated that he did not think the supreme court in the case of *Northern Pac. R. Co. v. Traill Co.*, *supra*, "intended to hold that a legal title to the land had not passed by the grant to the company." In regard to the effect of the patent in that case this language was used: "Why, it is asked, is there a necessity of such patents, if the title passed by the act itself? There are many reasons why patents should be issued upon the completion of portions of the road. They would identify the lands which are coterminous with the road completed. They would be evidence that the grantee, in the construction of that portion of the road, had fully complied with the conditions of the grant, and to that extent the grant was relieved of possibility of forfeiture for breach of its conditions; and they would obviate the necessity of any other evidence of the grantee's title to the lands embraced in them. They would thus be deeds of further assurance, confirmatory of the grantee's title, and so be invaluable to them as a source of quiet and peace in their possession."

In the case of *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 509, 41 Am. & Eng. R. Cas. 669, the supreme court says: "The title conferred by the grant was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. The grant was, therefore, until such location, afloat. But when the route of

the road was definitely fixed the sections granted became susceptible of identification, and the title attached to them, and took effect as of the date of the grant so as to cut off all intervening claims."

Again: "The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the land as coterminous with the road completed. They would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them. They would have obviated the necessity of any other evidence of the grantee's right to the lands, and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been, in these respects, deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions."

This last clause, it will be observed, is almost identical with the one already quoted from *Denny v. Dodson*. The same distinguished judge wrote both opinions, hence it cannot be doubted what was meant by the language used in this last one. It is true it is stated in this opinion that it makes no difference as to that case whether the railroad company had a complete title in equity or a legal title; still the conclusion seems inevitable that the views expressed in *Denny v. Dodson* are adopted by that court, and that the views expressed in *Buttz v. Northern Pac. R. Co.*, *supra*, are confirmed. In this case it is also stated that the land grants to the several railroads, made between 1860 and 1880, are similar in terms, and hence the interpretation of one applies to all. I hold that the latest expression of the supreme court is that the plaintiff in this case has the legal title, if any, to the premises in controversy. If this were a new question, I should be disposed to hold, as was held by Judge DEADY in *United States v. Childers*, 8 Sawy. 171, 12 Fed. Rep. 586, 6 Am. & Eng. R. Cas. 618, that the terms used in the grant, taken altogether, show that it was not the intention of congress to grant a present legal title to the lands granted to the Northern Pacific Railroad Company, but only a title which was to be perfected when a patent should issue therefor, which patent would by relation take effect from the date of the grant. But the views of the supreme court must control this. It has been held that a grant of the legal title by an act of congress to land owned by the United States is entitled to greater weight than a patent title executed by a ministerial officer of the government.

Smythe v. Henry, 41 Fed. Rep. 705; *Whitney v. Morrow*, 112 U. S. 693.

The next question for consideration is, should the plaintiff, having the legal title, have shown in its bill that it was in the possession of the premises in dispute? The bill does not so allege. It is set forth therein, "that to within a period of five years the premises were vacant, unoccupied, unfenced, and unimproved, and not used for any purpose." The inference is that the said premises were, at the commencement of this suit, occupied by some one, and it is not alleged that the plaintiff is that person. If possession in plaintiff was necessary in order to enable it to maintain this action, this should affirmatively appear in the bill. The above allegation was probably made with the view of showing that the statute of limitation had not run against this action. In the case of *Orton v. Smith*, 18 How. 263-265, the supreme court says: "Those only who have a clear, legal, and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title."

Possession
necessary to
equitable re-
lief.

To the same effect are *Hipp v. Babon*, 19 How. 271; *Ellis v. Davis*, 109 U. S. 485; *Killian v. Ebbinghaus*, 110 U. S. 568; *Fussell v. Gregg*, 113 U. S. 550; *United States v. Wilson*, 118 U. S. 86. The general rule is that those who have a legal title and are out of possession cannot maintain an action to remove a cloud upon their title. Possession must first be obtained in an action at law. Pom. Eq. Jur. §§ 1398, 1399, and note 4. If the statute law of the state gave the right to maintain an action where the plaintiff owns a legal title and is not in possession, the same right might be enforced in a federal court. Where a new equity is given by a state statute, that equity may be enforced in a court of the United States. There is, however, no statute in Montana which gives this right when the plaintiff is not in possession. The only statute upon this subject is as follows: "An action may be brought by any person in possession by himself or his tenant of real property against any person who claims an estate or interest therein adverse to him for the purpose of determining such adverse claim, estate, or interest." Comp. St. p. 160, § 366.

This is the same statute as exists in California upon this subject, and was copied from the statutes of that state by the legislative authority in the territory of Montana. It had received an interpretation in that state before its adoption in Montana, and since that date. The courts of California have held that under this statute it must affirmatively appear that the plaintiff is in the actual possession of the premises from the title to which he seeks to remove a cloud. *Curtis v. Sut-*

ter, 15 Cal. 260; Rico *v.* Spence, 21 Cal. 504; Lyle *v.* Rollins, 25 Cal. 437; Ferris *v.* Irving, 28 Cal. 645. Other cases might be referred to. Plaintiff has cited, as supporting a contrary view, the case of Southern Pac. R. Co. *v.* Wiggs, 43 Fed. Rep. 333. The learned and distinguished jurist who rendered that opinion does not state therein whether he holds to the view that plaintiff has a legal or an equitable title to the lands specified in plaintiff's bill. He does say that the remedy of plaintiff in that case was not as adequate and complete at law as in equity, and he cites in support of this view VanWyck *v.* Knevals, 106 U. S. 370, 10 Am. & Eng. R. Cas. 664; and Pixley *v.* Huggins, 15 Cal. 128. In the first of these the supreme court says, (see opinion, page 365, 106 U. S.): "The legal title under the grant goes to the state, but the equitable right vests in the company." It is evident that in this case the court was considering a cloud upon an equitable, not a legal, title. There are many cases which support the view that where the plaintiff has only an equitable title he has the right to maintain an action to remove a cloud upon the same, although not in possession, on the ground that he has no adequate remedy at law. In the last case it does not appear whether the plaintiff claimed under an equitable or a legal title. I do not think this case can be considered in opposition to numerous cases in the California supreme court that hold that in such cases, if plaintiff has a legal title in the premises, he must have possession. It should be remarked that at the time the opinion in the case of Southern Pac. R. Co. *v.* Wiggs, *supra*, was rendered, the statute law in California had been so changed as to permit an action to remove a cloud upon a title to be maintained by one having a legal title, though not in possession; and this may interpret that decision. People *v.* Center, 66 Cal. 551, 555, 556. There is a class of cases which seem to clash with the general rule that in cases to remove a cloud upon a title plaintiff must show possession of the premises claimed. There are cases where a party has purchased real estate at a sheriff's sale, and obtained a sheriff's deed therefor, and the judgment debtor has sold the same to a third party, with the view of defrauding his creditors. A bill is supported in these cases upon the ground that it partakes of the nature of a creditor's bill. Sands *v.* Hildreth, 14 Johns. 493; Hager *v.* Shindler, 29 Cal. 48; Lick *v.* Ray, 43 Cal. 83. There is another class of cases which at times appear to be confounded with these for determining the adverse title to lands. These are bills of complaint which have for their object the canceling and annulling of some deed or other instrument which affects the title to land which was obtained by fraud. In these cases the question of title to the land is not involved. Such

is the class of cases referred to in Story, Eq. Jur. § 694; *United States v. Minor*, 114 U. S. 233. The bill of complaint shows that this case is one to determine the adverse title of defendants, and not an action to cancel the patent to the premises named, issued to the defendant Catherine B. Cannon. If it could be considered an action to cancel the patent to said defendant for fraud, I should have doubts of the ability of the plaintiff to maintain this action. The fraud, if any, was perpetrated upon the United States; and the United States and said defendants are the parties to the conveyance. Plaintiff had received its title, if any, to the premises long prior to the issuing of this patent. In the case of *Field v. Seabury*, 19 How. 323, the supreme court says: "In England a bill in equity lies to set aside letters patent obtained from the king by fraud, (*Attorney General v. Vernon*, 1 Vern. 277, 370, 2 Rep. Ch. 353;) and it would in the United States; but it is a question exclusively between the sovereignty making the grant and the grantee."

In this, it might be said, the fraud complained of, as well as the contract embraced in the patent, is a question exclusively between the United States and the defendant. See, also, *White v. Burnley*, 20 How. 235; and, also, *Jackson v. Lawton*, 10 Johns. 24; *Hughes v. United States*, 4 Wall. 232; *Silver v. Ladd*, 7 Wall. 219; *Providence Rubber Co. v. Goodyear*, 9 Wall. 788; *Mowry v. Whitney*, 14 Wall. 434. It seems to be contended by plaintiff that the allegations of fraud in the bill would give the court jurisdiction to determine all the questions involved in this case. The contention seems to be that, where a suit has been brought to cancel an instrument obtained by fraud, a court of equity will take jurisdiction of all matters connected with the subject matter concerning which the fraud was perpetrated, and settle the whole controversy between the parties claiming an interest in the same. But the fraud which would give a court of equity jurisdiction must be a fraud of which the plaintiff has a right to complain, and not every fraud the defendant may have perpetrated concerning the subject matter in controversy. In the case of *Vance v. Burbank*, 101 U. S. 519, the supreme court said that the fraud which could be complained of in that case must be such as was practiced upon the unsuccessful party, and prevented him from fully exhibiting his case to the department; and that the unsuccessful party had nothing to do with the fraud practiced upon the United States. In that case the plaintiff sought to make the defendant a trustee of the title he had received from the government. If the fraud in this case is a matter exclusively between the United States and the said defendant, it is not one the plaintiff can bring an action

for, or one to annul the contract made with said defendant by the United States. Fraud in a conveyance does not render the same void as to every one. The person deceived by the fraud has a right to rescind the contract induced by it, or affirm it, and sue for damages for the fraud perpetrated. I do not think the plaintiff has a right to step into the place of the United States, and say: "For the fraud perpetrated upon the United States I will rescind this conveyance made to said defendant." The reason assigned for asking to have the patent set aside is that it prevents the plaintiff from receiving a patent to said premises from the United States. This may be an excuse for not issuing the patent to plaintiff, but not a legal one, if it is entitled to a patent to the premises. What would be the effect of annulling the patent to Mrs. Cannon? The decree would affect only the parties to this action, and, as far as the United States, which is not a party herein, and said defendant are concerned, the patent would still exist, (*Mowry v. Whitney*, 14 Wall. 434,) and plaintiff, I apprehend, would not have removed the obstacle in its way to a patent to said premises. Certainly there would be no compulsion on the part of the commissioner of the general land office to issue such a patent any more after such a decree than before it. If plaintiff can bring a suit to set aside this conveyance for fraud perpetrated on the United States, then it can maintain an action to set aside every patent made by the United States to any portion of an odd section within its grant, before as well as after the date of the same, unless prevented by the statute of limitations or the terms of its grant. As before stated, however, I cannot view this case in any other light than an action to determine the adverse title to a tract of land. That is the object of this suit.

The plaintiff has called the attention of the court to decisions in several of the states where it is held that actual possession is not necessary in order to maintain this action. In Illinois there is some statute which provides that this action can be maintained when the plaintiff is in possession of the premises, or they are unoccupied. *Hardin v. Jones*, 86 Ill. 315. Where statutes similar to this have been enacted the United States courts have recognized the right to the relief awarded, and have enforced it. *United States v. Wilson*, 118 U. S. 89; *Holland v. Challen*, 110 U. S. 15; *Reynolds v. First Nat. Bank of Crawfordsville*, 112 U. S. 405; *Chapman v. Brewer*, 114 U. S. 158. It is evident, without such statutes the general rule must prevail. Plaintiff, with considerable apparent confidence, cites the case of *Gage v. Kaufman*, 133 U. S. 471, as holding a different view than that expressed above. The allegation in that bill was, "seized in fee-simple." The term

"seised" is equivalent to the term "possessed." "Seisin" means "possession." "Livery of seisin" meant "delivering possession." The allegation was equivalent to saying that plaintiff was in possession, and held a title in fee. 1 Daniell, Ch. Pr. (5th Ed.) 363. It is urged, however, that where there is an equitable ground for relief possessed by a party he can seek a court of equity, and that, when a court of equity has taken jurisdiction of the matter, it will proceed to determine the whole case. This is the general rule. In this case it is urged that the court may take jurisdiction in order to prevent a multiplicity of suits. The bill does, perhaps, show several parties; but, as the legal title, if any, is in plaintiff, it might bring one suit against all these parties. The fact that they may claim different portions of the same quarter sections of land in dispute makes no difference. They can all be joined as defendants in one action of law to recover the possession of the premises. That a bill in equity would not lie in an action of this nature for the reason it would prevent a multiplicity of suits was determined in the case of *City and County of San Francisco v. Beideman*, 17 Cal. 461. Where a bill fails to show any ground for equitable relief the defect is one of jurisdiction, and this court cannot proceed to determine the merits of the controversy. *Oelrichs v. Spain*, 15 Wall. 227, 228; *Litchfield v. Ballou*, 114 U. S. 190, 7 Am. & Eng. Corp. Cas. 373. Many other cases might be cited to the same effect.

The other points presented in the demurrer herein will therefore not be considered. The demurrer is sustained upon the ground that plaintiff's bill shows no ground for any equitable relief.

Land Grant—Bill in Equity by Company Against Parties Claiming Under Subsequent Patent—Equitable Relief.—In *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 237, it was held that a railroad company which has, if anything, a legal title to lands by reason of a legislative grant, cannot maintain a bill in equity against parties claiming under a subsequent patent to have them decreed trustees of plaintiff and to convey the land to plaintiff, as, if plaintiff's title is good, then defendants have none, and such decree would not supply the place of the patent to which plaintiff is entitled. The court said: "Plaintiff has a legal title, if any, as it appears from the allegations in the bill, which is prior to that of defendants, and would avail it in an action of ejectment. If the court should decree defendants to convey to plaintiff their title to the premises in controversy, would it supply the place of the patent which plaintiff is entitled to from the United States? The functions of a patent to land conveyed by legislative act is thus stated in the case of *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 510, 41 Am. & Eng. R. Cas. 669. 'The subsequent issue of the patent by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the land as coterminous with the road completed. They would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the

grant was relieved of possibility of forfeiture for breach of them. They would have obviated the necessity of any other evidence of the grantee's right to the lands, and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and therefore a source of quiet and peace to it in its possessions.'

This was the same language used in *Denny v. Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899, where the very grant under consideration was interpreted, and in which it was held that plaintiff had a legal title to the lands embraced within its grant. Now, the land officers of the United States did not consider in issuing a patent to defendants that the plaintiff had complied with the conditions of its grant. They did not consider the title of the Northern Pacific Railroad Company, and the patent issued to them would be no evidence of a confirmation of that grant; and, if the patent to defendants did not determine these questions, a conveyance from defendants to them would not. Whether or not the plaintiff complied with the condition of the grant cannot be determined in this action. Where a grant is a public grant of the nature of the one to plaintiff, it can be forfeited only by the government making the grant by judicial or legislative proceedings. *Denny v. Dodson*, *supra*; *Schulenberg v. Harriman*, 21 Wall. 62; *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 473, 26 Am. & Eng. R. Cas. 525. It is evident, therefore, if the court should decree that defendants should convey to plaintiff their title, if any, to said premises, this conveyance would not place plaintiff in any better condition than now, if it has the legal title to the premises. It would not give the plaintiff a conveyance which would have the effect a patent to said lands would. For these reasons I do not think the bill shows sufficient equity to entitle plaintiff to the special relief asked."

Bill by Railroad Company to Establish Title to Land Granted—Equitable Relief—Remedy at Law.—In *Northern Pac. R. Co. v. Amacker*, 46 Fed. Rep. 233, it was held that a railroad company claiming land under a legislative grant, and having a legal title, if any, cannot, when out of possession, maintain a bill against parties claiming under a subsequent patent to determine title, on the ground that the exercise of equitable jurisdiction will prevent a multiplicity of actions, as in an action in the nature of ejectment plaintiff can join any number of parties defendant without regard to the extent or character of their possessions.

Two Land Grants Covering Same Premises—Elder Grant has Priority.—In *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, the several acts granting public lands in aid of the construction of the St. Paul & Pacific R. Co., were examined and analyzed. The court held that the grants to that company so far as they formed the subject of controversy were subsequent in date to the act under which the Northern Pacific Company claimed, and came under the well settled rule that where different grants cover the same premises, the elder takes the title.

Conflict Between Two Grants—Priority of Location.—As between two land grant railroads, the definite location of the line of road under a later grant, if the road is finished, will carry all lands within the place limits which have not been selected as indemnity lands under an earlier grant. *Sage v. St. Paul, Stillwater & T. F. R. Co.*, 44 Fed. Rep. 817.

Overlapping Grants—Surrender by One Grantee.—Where the limits of lands granted in aid of the construction of two branches of a railroad by the act of congress of 1856 overlap, a release and surrender of the lands in the common limits by descriptions, by a railroad company which has acquired the rights of both the original companies on those branches and by the governor of the state, in its behalf, to the United States, is a valid

surrender of all the lands within the common or overlapping limits. *Lake Superior Ship Canal R. & Iron Co. v. Cunningham*, 44 Fed. Rep. 587.

Conflicting Grants to Intersecting Roads—Lieu Lands—Sale of Reservation.—The grant of land by Congress to the state of Iowa to aid in the construction of two railroads described every odd numbered section within the limits specified on each side thereof, and provided that, if it should appear that any part thereof had been sold or reserved by the United States, other lands might be selected in lieu thereof. *Held* that, where the two roads cross each other, and the grants consequently conflicted, the granting to the state of a moiety of the odd numbered sections for the benefit of one road could not be regarded as a sale or reservation as to the other which would entitle it to other lands in lieu. *Sioux City & St. P. R. Co. v. Countryman* (Iowa, June 1, 1891), 49 N. W. Rep. 72.

NORTHERN PACIFIC R. CO.

v.

SANDERS.

(*U. S. Circuit Court, D. Montana, April 16, 1891, 46 Fed. Rep. 239.*)

Land Grant—When Lands are Withdrawn from Sale or Entry.—The grant by congress of public lands to the Northern Pacific R. Co., took effect only when the line of its road was definitely fixed, and a plat thereof filed in the proper office. Accordingly, lands within the limit of such grant are not to be considered as withdrawn from sale or entry until the line of the road was so definitely fixed.

Same—Inclusion of Lands entered under Invalid Claim.—The congressional grant of lands in aid of the Northern Pacific Railroad applied only to such lands to which "the United States had full title not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights at the time the line of such road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." *Held*, that lands entered as mining claims, for which applications for patents were pending when the plat of the road was filed, are not included in such grant, although such lands were subsequently declared to be agricultural, and the entries as mining claims held to be invalid.

ACTION of ejectment. On demurrer to answer.

F. M. Dudley, for plaintiff.

Adkinson & Miller and *W. F. Sanders*, for defendant.

KNOWLES, J.—The complaint in this case sets forth a cause of action in the nature of ejectment to recover the possession of section 21, in township 10 north, range 3 west, in Lewis and Clarke county, Mont. In it enough Case stated. is set forth to show that plaintiff received from the United States a grant of 20 alternate sections of land per mile on each side of its road in Montana as definitely fixed. This land was to be such as at the time plaintiff's road should be definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office the United States had full title to, and which was not reserved, sold, granted,

or otherwise appropriated, and was free from pre-emption or other claims or rights. It is set forth that the land is non-mineral, and an alternate section within the limits of said grant agricultural in character, and was on the 6th day of July, 1882, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The answer admits that the land is non-mineral; that defendants have entered upon said premises, and are now withholding the possession thereof from plaintiff; and then denies the allegations of the complaint that the said land was public land to which the United States had full title and was free from pre-emption or other claims or rights not reserved, sold, granted, or otherwise appropriated at the time the route of plaintiff's road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office by setting up affirmatively (1) that on the 2d day of August, 1880, Theodore H. Kleinschmidt, Edward W. Knight, and six others located under the mining laws of the United States and the laws of the territory of Montana, as eight distinct mining claims, the northeast quarter of said section 21; (2) that on the 12th day of August, 1880, George P. Reeves, Helen H. Reeves, and six others located under the mining laws of the United States and the laws of the territory of Montana, as eight distinct mining claims, the northwest quarter of said section 21; (3) that on the 19th day of February, 1881, Theodore H. Kleinschmidt, Henry M. Parchen, and six others located under the mining laws of the United States and the laws of the territory of Montana, as eight separate mining claims, the southwest quarter of said section 21; (4) that on the 13th day of March, 1880, Cornelius Hedges, Thomas A. H. Hay, and six others located according to the mineral laws of the United States and the laws of the territory of Montana, as eight separate mining claims, the southeast quarter of said section 21; that each of the locators above named were citizens of the United States; that afterwards the above named parties made application to patent said lands as mineral in the United States land-office at Helena, Mont., and for this purpose filed all the necessary affidavits and notices and proofs required in such cases; that afterwards plaintiff in this case protested against the issuing of patents to said parties on the ground that the same was non-mineral in character, and not subject to be patented as mineral land; that on account of this protest a contest was inaugurated in said land-office as to the right of said parties to a patent for said premises; that said contest existed and was pending on the 6th day of July, 1882, when the line of

plaintiff's road was definitely fixed opposite to said land, and a plat thereof filed in the office of the commissioner of the general land-office. To this answer plaintiff filed its demurrer, setting forth that the answer does not state facts sufficient to constitute a defense to the cause of action set up in the complaint. This brings up for consideration the question, whether or not a mining location made according to law upon an odd section of land within the limits of the Northern Pacific Railroad Company's grant, and an application made by the locators thereof to patent such claim in the United States land-office as mineral land, and claiming the same to be such, and filing all the necessary proofs of location, mineral character, and work accompanying such application as is required by law and the rules of the land department, and which is pending, and a contest in regard to the right of said parties to patent the same is existing in the United States land-office at the time the railroad of said company was definitely fixed, is sufficient to take such land out of such grant, although admitted now to have been non-mineral in character, and hence not subject to be located or patented as mineral land.

Question
presented.

That portion of the act making the land grant to the Northern Pacific Railroad Company, which bears upon this point, is as follows: "There be and is hereby granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph lines to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of said railway, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the commissioner of the general land-office."

Provisions of
act making
grant.

It is urged by defendants that it sufficiently appears from their answer that at the time plaintiff's road was definitely fixed a claim had attached to this land which excepted it from plaintiff's grant. Plaintiff urges (1) that at the time of the location of this land as mining claims no claims could attach to this land, because the

Plaintiff's
contentions.

same was at that time withdrawn from settlement or sale by virtue of section 6 of the act above referred to, as within 40 miles of the general route of its road as located in 1872; (2) that, considering there was this claim, it was not a valid claim, as it is admitted it was for mineral purposes upon agricultural land. Several cases were cited by plaintiff in support of its first proposition, which I do not feel called upon to review, because I have found no railroad grants to other railroad companies which correspond in all particulars with that of plaintiff upon that point.

The section of the act of congress in which is found plaintiff's grant, which it is claimed withdraws this land entirely from market after the general route of plaintiff's road was located, is as follows: "The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act."

**Withdrawal
of land—Olf-
forest grants
compared.**

The provisions corresponding to this in the act granting to the Union Pacific Railroad Company their land is found in section 7 of that act, and is as follows: "That within two years after the passage of this act said company shall designate the general route of said road as near as may be, and shall file a map of the same in the department of the interior, whereupon the secretary of the interior shall cause the land within fifteen miles of said designated route to be withdrawn from pre-emption, private entry, and sale; and when any portion of said route shall be finally located the secretary of the interior shall cause the said lands hereinbefore granted to be surveyed, and set off as fast as may be necessary for the purposes herein named." See 12 St. U. S. 493.

This act was so amended as to make "fifteen" in this section read "twenty." 13 *Id.* 358. It will be seen by an examination of this section as amended that all lands, whether odd or even numbered sections, for 20 miles on each side of the general route of said company's road, are withdrawn from pre-emption, private entry, and sale at the time of the fixing of the general route of that company's railroad, without any reference as to whether they are granted lands or not. The Central Pacific Railroad Company's grant is the same as the Union Pacific Railroad Company's and subject to the same limitations. There is no doubt about the provisions of the Union Pacific Railroad and Central Pacific Railroad act requiring all lands,

whether granted or not, to be withdrawn at the time the general route of the road is fixed within the limits of its grant. The act making the land grant to the Atlantic & Pacific Railroad Company, which is the same as the grant to the Southern Pacific Railroad Company, is also materially different from that of the act making plaintiff's grant. The section in the act making the grant is the third, and is as follows: "That there be and is hereby granted to the Atlantic & Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land-office." 14 St. U. S. 294.

It will be seen by a comparison of this grant with that of plaintiff's that in the former the grant takes effect when the line of the road is designated by the filing of the plat thereof in the office named; in the latter, only when the line is definitely fixed, and a plat thereof filed in the proper office. I do not see but that in the former a plat designating the general route of that road, filed in the proper office, would cause the grant to become fixed, while in the latter the definite route has to be fixed. The provision in the Atlantic & Pacific Railroad Company's grant, which is similar to that of the sixth section in plaintiff's grant, and withdraws lands along the route of that road from sale, is as follows: "That the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act."

If I understand the case of *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 458, the position is that the filing a plat designating even the general route of that company's road fixed

the grant, and the law withdrawing the lands granted took effect. The decisions upon the construction of that grant, then, upon this point,—and certainly those that pertain to the Union and Central Pacific Railroad Companies,—do not apply in this case. They are not even analogous upon this point. Plaintiff, however, calls the attention of the court with a considerable confidence to the cases of *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 29 Am. & Eng. R. Cas. 455, and *Denny v. Dodson*, 13 Sawy. 68, 32 Fed. Rep. 899, upon this point. It cannot be denied that there is language in both cases which supports plaintiff's view; but in the first case, at least, the language used was not necessary to the decision of the question at issue. In the first case it appears from the statement of facts that one Peronto, under whom, I suppose, plaintiff Buttz claimed, settled upon the land in dispute on the 5th day of October, 1871, while the land was situate in the Indian country. The United States statutes prohibits any settlement upon land in the Indian country. Peronto was, then, a trespasser there. On either June 19, 1873, or June 22, 1874, the Indian title was extinguished by treaty with the United States, and Peronto was found upon the land at that time. But on the 26th day of May, 1873, some 25 days before, in any event, the Indian title was extinguished, the Northern Pacific Railroad Company filed with the commissioner of the general land office a plat of the route of their road as definitely fixed across the country upon such a line as would include the land Peronto had settled upon within its grant. The court held that, notwithstanding this Indian title of occupancy, the grant to plaintiff took effect upon the filing of this plat. As the said Peronto or Buttz had no settlement which could be at all recognized in law, up to this time the grant of the railroad company was prior to any rights that either could claim. There could be no doubt but when that grant gained precision by the definite fixing of the route of plaintiff's road the land in controversy in that case was withdrawn from sale or homestead rights, or any other rights that could attach to the same subsequent to that definite fixing of the line of plaintiff's road—*First*, because it had already been sold to plaintiff; and, *second*, because at that time, by virtue of the provisions of section 6, it was excluded from sale or pre-emption or homestead settlement because the permanent route of the road had been fixed. It appears, however, that the general route of the road of plaintiff was fixed and a plat thereof filed on the 21st day of February, 1872, some four months after Peronto's settlement. The court proceeds to say that this act withdrew the land from the market. It had not reached that condition when it was in the

Authorities
reviewed.

market at that time. The statute preventing settlement upon it as within the Indian country prevented it. When it had, the definite route of the road had been fixed, and there was no function for the provisions of section 6 to perform before that time, considering that it is liable to the interpretation given it by the court. As to the interpretation of section 6 the very eminent jurist who delivered the opinion said: "When the general route is thus fixed in good faith, and information thereof given to the land department by filing a map thereof with the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

It will be seen here that he makes the withdrawal of the land from sale, etc., to depend upon the filing of the map of the general route with the secretary of the interior. The law does not authorize the filing of any such map in plaintiff's grant. It does not say the withdrawal shall take effect upon the filing of any such map. In the act making the grant to the Union and Central Pacific Railway Companies there is a provision for filing such a map, and the withdrawal of all the land from market within the limits of the grant to these companies. The general language of the opinion would also indicate that it was the opinion of the court that section 6 of plaintiff's grant would withdraw all odd sections of land from the market, whether mineral or not, or whether homestead or pre-emption claims had attached to the same or not prior to the designating this general route. That certainly was not contemplated. It would appear that the eminent jurist in writing that opinion had in mind more the bearing of the provisions of the act making grants to the Union Pacific and Central Pacific Railway Companies, with which he was undoubtedly very familiar, than the act making plaintiff's grant, for he makes no difference hardly in the provisions of these two acts, except as to the extent of the grant, while upon this point, as I have shown, they are very dissimilar. I think this is a proper case in which to apply the rule expressed by Chief Justice MARSHALL as to the authority of a decision in the case of *Cohens v. Virginia*, 6 Wheat. 399. In that case, speaking for the supreme court, he said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which these opinions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for discussion."

See, also, *Barney v. Winona & St. Peter R. Co.*, 117 U. S. 228-231, 26 Am. & Eng. R. Cas. 522. I do not believe there was any demand for a construction of section 6 in plaintiff's

grant in the case of *Buttz v. Northern Pac. R. Co.*, 119 U. S. 55, 29 Am. & Eng. R. Cas. 455, in connection with the filing of a map of the general route of its road, and hence the construction made is not binding in this case. In the case of *Denny v. Dodson*, *supra*, the plaintiff brought an action of ejectment, and in setting up his cause of action stated facts sufficient to show the grant of the land in dispute to the Northern Pacific Railroad Company, under whom he claimed; and then undertook to set forth facts to show that the land named in that case did not come within any of the limitations specified in plaintiff's grant, such as that the same was land to which the United States had full title not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office. While it may be doubted whether the plaintiff was required to allege and prove these facts, they being facts the principal purpose of which would be to negative any defense that might be presented to plaintiff's cause of action in that case, nevertheless, if required to be alleged, they should have been alleged directly, and not facts which by inference would show that this was true. It is an established maxim that material issuable facts as they exist should be alleged, and not facts from which such facts may be inferred. Pom. Rem. & Rem. Rights, §§ 517, 532;

**Insufficiency
of plaintiff's
allegments.**

Stringer & Davis, 30 Cal. 318. But instead of averring the facts which showed that the land was not within any exception to plaintiff's grant directly, plaintiff alleges that at the time of the establishment of the general route on the 13th day of August, 1870, the land was public land not mineral, and not reserved, sold, granted, or occupied by homestead or other settlers, or otherwise disposed of or located upon, and was free from pre-emption or other claims or rights. It seems to have been considered, if the lands were withdrawn from the market at that time, and this land was not then within any of the exceptions in plaintiff's grant, no such claim which could create such an exception could arise after that time; hence this was equivalent to an allegation that no claims creating such an exception could have existed at the time the line of the road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office. I submit that this result is reached only by an inference, or arises from an argument on the facts alleged; and this is not good pleading. But the eminent jurist thought this was equivalent to the other; and stated that, after the date of the establishment of the general route, it precluded any town site, pre-emption, or entry on

such land, and said: "The law thus withdraws the land granted from sale and entry or pre-emption from the time the general route is fixed." To me this decision upon this point is unsatisfactory, and this court is not precluded by it. In looking at section 6 I find no authority for the assertion that any lands were to be withdrawn from market on the sides of the general route of the road of plaintiff when established. The section does not say so. It says the lands granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company. The establishing of the general route of the road could not determine what were the lands granted. These were determined by the fixed route of the road. The section does not say they shall be withdrawn at the time of the fixing of the general route of the road. If it should be so interpreted, then we have lands withdrawn from market which are not identified, and which may be many miles outside of the 40-mile limit on each side of the general route of the road, for the fixed route of the road may be a long distance from the general route thereof. Such facts have occurred in connection with plaintiff's road in Montana. The general route of plaintiff's road as located in 1872 extended down the Gallatin river up the Jefferson and Big Hole rivers, to a point south of the Deer Lodge pass in the Rocky mountains; thence through that pass and down the Deer Lodge river to its present route at Garrison. At points in this general route upon a north and south line it was near 100 miles south of the fixed route of plaintiff's road near Helena, Mont. There are several places in Montana where the fixed route and the general route of plaintiff's road materially differ. By the terms of plaintiff's grant in section 3 lands in odd sections within 40 miles north of the fixed route of plaintiff's road near said city of Helena, are within it; they are part of the lands granted to the plaintiff, and it has asserted title to the same. Many of them were not within the 40-mile limit on each side of said general route. Yet, if the construction contended for of said section 6 is correct, these lands were withdrawn from market in 1872. Lands which have been sold by the United States upon odd sections were withdrawn because they were upon odd sections granted. It is admitted, and there can be no contention on the point in the light of judicial decisions but that the law withdrew the lands granted from the market, and they were not withdrawn by any order of the secretary of the interior. By his order lands near 150 miles south of the fixed line of plaintiff's road were sought to be withdrawn from market, although it cannot now be contended they were within the limits of plaintiff's grant, or granted to it by any construction of the law.

It cannot, I think, be contended that part of the lands on the line of plaintiff's road which were granted to it were withdrawn from market by the provisions of section 6, and part not. In my judgment, if one section granted was withdrawn when the general route of the road was fixed, then all such lands were withdrawn. I think there is enough dis-

Rules for construction of legislative grants.

pute about the construction of section 6 to drive us to the established rules for construing legislative grants in considering the same. Rights were given plaintiff in this section. In construing legislative grants they are to be construed against the grantee and in favor of the grantor. 3 Washb. Real Prop. (4th Ed.) 190. "The rule of construction in all such cases is now fully established to be this: That any ambiguity in terms of the contract must operate against the adventurers and in favor of the public, and the plaintiff can claim nothing that is not clearly given in the act." *Proprietors v. Wheeley*, 2 Barn & Adol. 793. This rule is fully approved by the supreme court in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. In the case of *Dubuque & P. R. Co. v. Litchfield*, 23 How. 66, the supreme court said: "All grants of this description are construed against the grantee. Nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of congress, the donation stands on the same footing as a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and, if not thus expressed, they cannot be implied."

To the same effect are the cases of *Rice v. Minnesota & N. W. R. Co.*, 1 Black, 360; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733. The reason of this rule is thus expressed in *Gildart v. Gladstone*, 11 East, 675: "The reason of this rule is obvious. Parties seeking grants for private purposes usually draw the bills making them. If they do not make the language explicit and clear to pass everything that is intended to be passed, it is their own fault: while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking by ingenious interpretation and insinuation that which cannot be obtained by plain and express terms."

This language was quoted and approved by the supreme court in the case of *Dubuque & P. R. Co. v. Litchfield*, *supra*. If it is said this is a law, and we must be governed by the intention of the law-making power, the answer is that in construing such a law the intention should be formed from the terms used and the subject-matter under consideration, and it should be recognized that it makes a grant of land. In the

case of *Leavenworth, L. & G. R. Co. v. United States, supra*, the supreme court, in speaking of a land grant made in 1863 (the year before the plaintiff's grant) to the state of Kansas, said: "Formerly lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded settlement of the country, and at the date of this act the rule was not to withdraw them until the road should be actually located. In this way the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant the same as if it had not been made; but they ceased when the routes of the roads were definitely fixed."

We learn from this the state of mind congress was in upon this subject. The great body of the country on the proposed route of plaintiff's road at the time of the grant was Indian country, to which the Indian title of occupancy was not extinguished. But very few of the lands along this route had been surveyed. Yet most of the country was accessible. It could hardly have been contemplated that it would be 18 years after the grant was made before the fixed route of that road would be established in Montana. It was very uncertain from the nature of the country what would be the fixed route of that road. The determination of this fixed route would give precision to the grant made plaintiff, and furnish a *data* for determining what lands had been granted. Can it be supposed that congress intended 10 years before the fixed route of plaintiff's road was established, to withdraw the lands granted to plaintiff from market, and leave it to subsequent explorations and surveys to determine what would be the lands granted? Upon such lands, during the time of these explorations and surveys, homes might be established and cities built. But it is said they were notified what these lands were by the establishing of the general route. As I have stated before, there are lands confessedly within plaintiff's grant which were not within the 40-miles limit on the line of the general route of plaintiff's road as established in 1872, and there are lands within it which were not granted to plaintiff. There might have been much more land of that character if some of the routes said to have been examined by that company had been finally adopted. As to what were the lands granted plaintiff, and when the grant attached to specific lands, we have a guide in the case of *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, which interpreted the third section in the Union Pacific Railroad Company's grant which is almost identical

Intention of
congress.

with the same section in plaintiff's grant. See 12 St. U. S. 492. In that case, speaking through the distinguished Justice MILLER, the court said: "The land granted by congress was, from its very character and surroundings uncertain in many respects until the thing was done which should remove that uncertainty and give precision to the grant. Wherever the road might go the grant was limited originally to five sections, and by the amendment of 1864 to ten sections, on each side of it within the limits of twenty miles. These were to be odd-numbered sections, so that the even-numbered did not pass by the grant; and these odd-numbered were to be those not sold, reserved, disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed. When the line was fixed,—which we have already said was by the act of filing this map of definite location in the general land office—then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had been made. This filing the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached, for by examining the plat of this land in the office of the register and receiver or in the general land office it could readily have been seen if any of the odd sections within ten miles of the line had been sold or disposed of or reserved or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections not in this condition are granted. The grant is limited by its clear meaning to the other odd sections, and not these.

We have here a clear assertion that what lands are granted are only determined when the line of the road is definitely fixed. In quite a number of decisions by the supreme court it is said of such grants as the one under consideration they are in the nature of floats.

When the route of the road is fixed which the law defines shall fix the grant then it takes precision, and attaches to certain specific lands. *Schulenberg v. Harriman*, 21 Wall. 60; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 741; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 509, 41 Am. & Eng. R. Cas. 669. Can it be that congress intended to say in the act granting lands to plaintiff that, although it will not be known until plaintiff designates a fixed line for

Grant determined when line is fixed.

its road and files its map thereof in the office of the commissioner of the general land office, what specific lands are granted to it, yet these lands granted, as in this case, are to be withdrawn from market 10 years or more before it is known what they are and where situate? This construction would make the intention of congress unreasonable, which should never be maintained until there is no escape. A reasonable intent should always be presumed. The construction urged would make the statute about as unreasonable as one which doomed a man to capital punishment 10 years before he was born. Taking into consideration all these facts, and I do not think § 6 should be so construed as to withdraw any land from market until the line of plaintiff's road should be definitely fixed opposite the same, and a plat thereof filed with the commissioner of the general land office, when the situation of such lands would be known.

But let it be admitted that the land granted was withdrawn from market at the time of the filing of the plat of the general route of plaintiff's road. Then the question arises what are the lands granted? The act does not say "every odd section within forty miles of such general route," but "public lands not sold, reserved, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the route is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." This brings us back to the same point as the construction contended for. The land granted must at this time be free from a claim, or it is not land granted. Hence I hold that the premises in dispute were subject to be entered upon and a claim inaugurated at any time before the definite line of plaintiff's road was fixed and the plat thereof filed in the proper office.

Land granted must have been free from claim.

The next question is as to whether the claim made upon these lands would avail if not a valid claim. The premises being agricultural, no valid claim of them for mining purposes could be made. The language for consideration here in the act making the grant to plaintiff is: "Shall be free from pre-emption or other claims or rights." What, in effect, the court is asked to do in construing this clause is to insert before "claims" the word "valid," so the clause would read "free from pre-emption or other valid claims or rights." Can the court do this? In the case of *Newhall v. Sanger*, 92 U. S. 671, the supreme court was called upon to construe a statute of the United States in which the words "lands claimed under any foreign grant or title" occurred. The position taken in that case was that the word "lawfully" should be placed before

Effect of claim being invalid.

"claimed." But the court said there is no authority to import a word into a statute, in order to change its meaning. In the case of *Leavenworth, L. & G. R. Co. v. United States*, *supra*, the supreme court quoted with approval this language of PATTERSON, J., in *Rex. v. Burrell*, 12 Adol. & E. 465: "I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty." And then said: "Courts have always treated the subject in the same way when asked to supply words in order to give a statute a particular meaning which it would not bear without them."

The word "valid" or "lawful," placed before "claims," would give the statute a different meaning from what it has without them. If they would not, plaintiff would not ask to have one or the other placed there. Here again the rule applies as to the construction of legislative grants. Nothing passes by such but what is conveyed in the act making the grant in clear and unambiguous terms. Such a grant must be construed most strongly against the grantee. Nothing is supplied by implication. There is another matter in this connection worthy of much consideration. If only lands which are free from valid or lawful claims at the date plaintiff fixed the definite line of its road are to be excluded from the grant, then the question is left open for consideration between plaintiff and any person who may have had a claim upon any odd section of land within its grant, the assertion of claim to which occurred since the act making the grant; for it can hardly be maintained that plaintiff would be bound by any determination as to the validity or lawfulness of a claim made by the land department which is junior to the grant to it. When the route of plaintiff's road was definitely fixed its grant to the lands received by it would relate back to the date of the act making the grant, and take effect as of that date. This, in substance, is the language of many decisions in construing similar grants. Under these conditions plaintiff could inquire into every claim which had its inception subject to the date of its grant whether patented or not, and have it determined as to whether it was valid or not. The point as to whether a homestead claim had attached to a parcel of land within the limits of the grant to the Kansas & Pacific Railway Company was considered by the supreme court in a case where that company was plaintiff and Dunmeyer was defendant, which was cited *supra*. In that case the court said: "It is not conceivable that congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended

to raise up in antagonism to all actual settlers on the soil when it had invited to its occupation this great corporation with an intent to defeat their claims, and to come between them and the government as to the performance of their obligations."

I do not see why this language is not as applicable to a party asserting a right to a mining claim as to one asserting a right to a homestead claim; and, if so, I might say it is inconceivable that congress intended to give to plaintiff the right to test the validity of every mining claim which existed within 40 miles of the line of its road at the time the same was definitely fixed. Under such circumstances, public policy would dictate that the terms of limitation in plaintiff's grant should not be so modified as to permit such a condition of affairs. I think the facts presented show that the assertion of title by the parties who located the ground in dispute as mineral land should be dignified with the appellation of a "claim." I would not say that every assertion of title to land would be entitled to the term "claim." Perhaps acts sufficient should accompany the assertion of title to entitle the claimant to a standing in a court of justice to contest the right to possession of the premises; but I am not called upon in this case to determine more than that facts sufficient appear to show that the parties who had located this land in dispute as mineral had a claim thereon at the time the route of plaintiff's road was definitely fixed. The fact that it was determined subsequent to the fixing of each route that this claim was invalid would not restore the premises to plaintiff's grant. It was excluded therefrom. This was fully considered in the case of *Kansas Pac. R. Co. v. Dunmeyer*, *supra*. For these reasons the demurrer to the answer is overruled.

Land Grants—Conflict between Claims of Railroad Company and Settlers.—See *Savannah, etc. R. Co., v. Davis*, 43 Am. & Eng. R. Cas. 542, note 549; *Larsen v. Oregon R. & N. Co.*, (Ore.) 44 *Id.* 92.

Rights of Settlers on Lands Granted to Railroad Company—Withdrawal of Lands from Entry.—In *McLaughlin v. Menotti*, (Cal. May 30, 1891), 26 Pac. Rep. 882, it was held that under the act of Congress of July 1, 1862, granting public lands in aid of a certain railroad company, the filing of a map of the route of the road with the secretary of the interior, and the order of the secretary withdrawing the lands from preemption, private entry, and sale, precluded the subsequent inception of any rights in favor of any one other than the railroad company. After such order of the secretary of the interior withdrawing the lands, the land department had no authority to hold that the land was subject to selection by the state. The company having accepted the terms of the grant and acted upon them, congress had no power to divest it of its rights in the land. To entitle a person to the exception in favor of a *bona fide* settler contained in the act granting the land, it is not enough to show that he merely occupied and improved the land. The court said: "Was the defendant a *bona fide* settler? Counsel for appellant said at the argument that the act as enrolled reads, 'or the

improvements of a *bona fide* settler on any lands returned and denominated as mineral lands,' etc., but assumed that the court would be bound to read it as printed in the volumes of the United States Statutes at Large, and that, if the defendant was a *bona fide* settler at the time the land was withdrawn from sale by the secretary of the interior, the judgment of the court below should be affirmed. We consider the case from this standpoint. No case was referred to, nor have we been able to find one, in which the words '*bona fide* settler' have been construed. We think, however, that they must refer to one who has done something more than merely occupy the land, and put a few improvements upon it; and that is all the court has found here. It cannot be said that every one who enters upon land, and builds a fence and a cabin or a house, is a *bona fide* settler. If congress had intended to exclude from the grant all lands upon which there were settlers having improvements, without regard to the question whether their entry or possession were lawful, it is not likely that it would have employed the term '*bona fide*.' Some effect must be attributed to those words. There certainly must be shown an intention in good faith to proceed diligently to comply with the laws, and acquire title. Appellant contends it must be shown that the settler entered upon the land for the purpose of acquiring title thereto from the government, and that he possessed the necessary qualifications to entitle him to connect his claim with the paramount source of title, and in support of his contention cites the case of *U. S. v. Railroad Co.*, recently decided in an oral opinion by Judge SAWYER, in the United States circuit court. There appears to be sound reason in the contention, but the exigencies of the case before us do not require us to hold that it must always be shown that the settler was 21 years of age, or the head of a family, or had served the requisite time in the army or navy, and that he was a citizen of the United States, or had declared his intentions to become such. The question whether a settler is a *bona fide* settler is one of fact.

"In this case the ultimate fact is not found. Hirleman went upon the land and made improvements thereon in 1858, seven years prior to the time the land was reserved from sale, but for what purpose it is not found, except inferentially. Whether he was possessed of the qualifications necessary to enable him to initiate a valid claim is not found. It is true, it was in the power of congress to exempt from the grant to the companies lands occupied by aliens, and that the legislation of congress has been very liberal in enabling them to qualify themselves to acquire title to the public lands,—perhaps too liberal; but it has never been the policy of the government to encourage settlement without an intention on the part of the settler in good faith to proceed diligently in all the steps necessary to be taken in order to obtain the title. The facts that a settler has occupied and improved the land are merely evidentiary matters. Good intentions alone, added to settlement and improvements, will not establish the ultimate fact. A party who has entered upon public land to acquire the title from the government must show his good faith by diligently complying with the requirements of the law under which he expects to secure the title. *Mott v. Hawthorn*, 17 Cal. 58; *Western Pac. R. Co. v. Tevis*, 41 Cal. 494. The evidence fails to show that the defendant has done so. The failure of the court to find the ultimate fact referred to left the question as to which party has the better title uncertain and unsettled, and entitled the plaintiff to a new trial. The appeal from the judgment was taken more than six years after the entry of the judgment. It is therefore dismissed. *Langan v. Langan*, (Cal.) 26 Pac. Rep. 704. (filed May 25, 1891.) The order appealed from is reversed."

Reservation of Pre-emption Claims.—When Claim is Considered as Attached to Land.—In *Whitney v. Taylor*, 45 Fed. Rep. 610, it appeared that Act Cong., July 1, 1862 (12 U. S. St. 489), granted in aid of a railroad company all the odd-numbered sections of land within certain limits "to which a

pre-emption or homestead claim may not have attached." In 1857 one J. had filed a pre-emption declaratory statement on land within the terms of the subsequent grant, which statement remained intact until after the final location of the railroad, and until 1885, when it was cancelled because J. had never lived on the land. *Held* that, notwithstanding the subsequent cancellation of the statement, the pre-emption claim had attached to the land within the meaning of the statute, and hence such land is excluded from the grant, and is open to settlement after such cancellation. The court said: "The failure of Jones to comply with the pre-emption laws did not cause the land to revert to the railroad company, and it did not, by reason of any failure of his to comply with the law, become a part of the grant; but, upon the cancellation of his statement, the land was open for settlement. This conclusion is sustained by the land department and upheld by the decisions of the supreme court of the United States in *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 734; *Newhall v. San-ger*, 92 U. S. 761; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Hastings & Dakota R. Co. v. Whitney*, 132 U. S. 357, 40 Am. and Eng. R. Cas. 426, and by the supreme court of Nebraska, *Burlington & M. R. R. Co. v. Abink*, 14 Neb. 95, 10 Am. & Eng. R. Cas. 686. It is true that in several of these cases there was either a valid homestead claim initiated by settlement followed by an entry, or a pre-emption claim initiated by a settlement followed by a declaration of intention to purchase; but the decisions are based upon the fact of the filing of the declaratory statements in the proper land-office. The cases all proceed upon the theory that when this claim is filed the right of the applicant becomes 'attached to the land.' The word 'claim,' as used in the act, was not intended to be restricted to such homestead and pre-emption claims as should afterwards ripen into perfect title, but was intended to include all claims that were made in such form as to be recognized and allowed by the land-office, without any regard to the question whether they were valid at the time of filing, or whether they were afterwards perfected, abandoned, cancelled, or forfeited. In *Kansas Pac. R. Co. v. Dunmeyer*, *supra*, the court, in distinguishing the case from *Natoma Water & Mining Co. v. Bugbey*, 96 U. S. 165, said: 'In the case before us, a claim was made and filed in the land-office, and there recognized, before the line of the company's road was located. That claim was an existing one, of public record, in favor of Miller, when the map of plaintiff in error was filed. In the language of the act of congress, this homestead claim had attached to the land, and it therefore did not pass by the grant. Of all the words in the English language this word "attached" was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land-office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land, it was excepted out of the grant as much as if in a deed it had been excluded from the conveyance by metes and bounds.'

Rights of Settlers—Evidence as to Prior Pre-emption Claim.—Congress has full power to withdraw public lands from sale, though in possession of qualified pre-emptors, if they have not paid for the land, and may sell or grant such land to others, as it pleases. In an action of ejectment by the successor in interest of the Central Pacific Railroad Company to recover possession of a strip of land forming part of the right of way granted to the company by congress, evidence is not admissible to show possession of the land by the predecessors of the defendant prior to the railroad

grant, and that they were qualified pre-emptors, if it appears that none of them procured title to the land before it was granted to the railroad company. *Southern Pac. R. Co. v. Burr*, 86 Cal. 279.

Patent Erroneously Issued to Settler—Right of Railroad Company to Equitable Relief.—A patent issued, in the name of the United States to a pre-emptor, entering upon these lands subsequent to the order of withdrawal, is, erroneously, issued without authority of law, and is void. The existence of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's rights, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined. *Southern Pacific R. Co. v. Wiggs*, 43 Fed. Rep. 333.

Rights of Settlers Entering on Land before Definite Location of Road.—Act Cong. July 1, 1862, as amended by act of July 2, 1864, granted to the C. P. R. Co. alternate sections of land, to aid in the construction of its road, but reserved any land to which a pre-emption or homestead claim might attach before the line should be definitely fixed. Ten months before the line of the road was definitely fixed land covered by the grant was settled upon and improved, and ten days before the line was fixed the settlers filed their affidavits and declaratory statements in the proper land-office. *Held*, that the land did not pass under the grant. *Peers v. Deluchi, et al.* (Nevada, April 6, 1891), 26 Pac. Rep. 228.

Abandonment of Pre-emption Claim—Ejectment of Claimant.—In an action in the nature of ejectment by a railroad company claiming under a legislative grant on conditions subsequently fulfilled, a complaint, otherwise setting forth a good cause of action, is not rendered demurrable by the allegations that on a certain day, fourteen years before the fulfillment of said conditions, one G. filed a declaratory statement, wherein he alleged settlement on and made pre-emption claim to the lands in controversy, but that said G. did not then or at any time make settlement on said lands, and that until subsequent to the time plaintiff claimed to have fulfilled its conditions no other entry or filing was made on the land, as, if these facts showed that a pre-emption claim had existed, it should be considered to have been abandoned. *Northern Pac. R. Co. v. Meadows*, 46 Fed. Rep. 254.

Possession by Mere Squatter of Land Granted not Material.—The fact that public land is in the possession of a settler, who is living on it, without complying with either the pre-emption or the homestead law at the time the land is included in a grant to a railroad company, does not keep it from being public land not reserved, sold, granted, or otherwise appropriated. *Cahalan v. McTague*, 46 Fed. Rep. 251.

Unlawful Occupancy of Public Lands within Limits of Grant.—The inclosure and occupancy of lands in an odd-numbered section, and within the limits of a grant to a railroad company, where the entry was made after the same had been withdrawn from sale or entry, and before completion of the railroad, or any declaration of forfeiture of the grant, by a person who, in good faith, intended to acquire title to it by purchase from the railroad company, is not made unlawful by the act of congress entitled "An act to prevent unlawful occupancy of the public lands," approved February 25, 1885 (23 U. S. St. 321). *United States v. Osborn*, 44 Fed. Rep. 29.

JACKSON

v.

LA MOURE COUNTY.

(North Dakota Supreme Court, Sept. 2, 1890.)

Land Grants—Selection of Indemnity Lands—Taxation.—Title to the indemnity lands in the grant to the Northern Pacific Railroad Company does not pass from the United States until the selection of such lands by the company with the approval of the secretary of the interior. Until such approval such lands are not subject to taxation.

Action to Remove Cloud—Who May Maintain.—One in possession of real estate, but having no legal or equitable title thereto, cannot maintain an action to remove a cloud upon the title.

APPEAL from District Court, Stutsman County.

C. W. Davis, for plaintiff.

N. B. Wilkinson, for defendant.

CORLISS, C. J.—The tax proceedings to enjoin which this action was instituted were clearly void. The land attempted to be taxed was not subject to taxation. It was property of the United States. *Van Brocklin v. Anderson*, 117 U. S. 151; *Tucker v. Ferguson*, 22 Wall. 527. The exemption of such property from taxation by the states rests upon the doctrine that there must inhere in every government the power to perpetuate itself. The supremacy of the federal government could be annihilated by hostile taxation by the states of federal agencies and property. With respect to property, the power to tax, save as limited by constitutional inhibition, acknowledges no restraint. All federal agencies and property might be thus transferred to the coffers of the state, were they subject to taxation. The land in question was embraced within the territory of the indemnity lands of the Northern Pacific Railroad Company, and was such land as the company might, under its grant, select to make good its losses of land within the "place" limits by reason of prior settlement, or for any reason. It is, however, averred in the complaint, and admitted by the demurrer, that the company has never made the selection of the land in question, or of any part thereof, and that the United States still holds the legal title to the land. Under these facts the property was not subject to taxation. *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 509, 41 Am. & Eng. R. Cas. 669.

Taxation of
federal
agencies and
property.

Selection of
indemnity
lands.

Even selection by the company, without the approval of the secretary of the interior, would not have divested the government of its title to the land. It was so held in the case cited. The company in that case had, in fact, made selection of the lands sought to be taxed, but the secretary had refused to approve the selection, insisting that the company was not entitled to such lands, claiming that it had already secured more than it could rightfully hold under the grant. The secretary was in error. The company was in fact entitled to as much indemnity lands as it had selected. But the supreme court held that, as the secretary had refused to approve the selection, no title whatever had passed, and the lands were not therefore taxable, notwithstanding the fact that the secretary's refusal was unjustifiable. The soundness of this decision cannot be assailed. There is a well defined difference between "indemnity" lands and "place" lands. The latter become instantly fixed by the adoption of the line of the road. The odd numbered sections to the amount of 20 sections a mile on each side of the road were granted to the Northern Pacific Railroad Company by the act of congress. The language of the grant is that there be and "are hereby granted." The moment the route of the railroad had been definitely established these sections were susceptible of identification, and *eo instanti* the grant attached to them, the translation of title relating back to the date of the grant. Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 509, 41 Am. & Eng. R. Cas. 669; St. Joseph & Denver City R. Co. v. Baldwin, 103 U. S. 426, 2 Am. & Eng. R. Cas. 510; Barney v. Winona & St. Peter R. Co., 117 U. S. 228, 26 Am. & Eng. R. Cas. 522; Denny v. Dodson, 32 Fed. Rep. 899; Northern Pac. R. Co. v. Majors, 5 Mont. 111, 14 Am. & Eng. R. Cas. 487. But the indemnity lands cannot be ascertained by the mere location of the road. They are substitutes for granted lands lost, and it is therefore important that the fact of such loss from the attaching superior preemption or other rights to any portion of the "place" lands should be ascertained by the interior department before allowing the company to make selection for indemnity; and it is also necessary for that department to determine whether the lands which the company desires to select for indemnity are open to selection; whether there is not some prior claim upon them in behalf of settlers or others. It is therefore entirely proper that the secretary of the interior should have the right to approve or disapprove of the selection before it becomes final. This is clearly the meaning of the provision of the grant to the Northern Pacific, which declares that the indemnity lands shall be selected by the company "under the direction of the secretary of the inte-

rior." 13 St. U. S. chap. 217, p. 365, § 3; *Elling v. Thexton*, 7 Mont. 330; *St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co.*, 112 U. S. 720. The statute must have the same construction that would be given it if the word "approval" had been used in place of the word "direction." The title to indemnity lands does not pass until selection has been made. *Ryan v. Central Pac. R. Co.*, 99 U. S. 382; *St. Paul & Sioux City R. Co. v. Winona & St. Peter R. Co.*, 112 U. S. 720; *Barney v. Winona & St. Peter R. Co.*, 117 U. S. 228, 26 Am. & Eng. R. Cas. 522; *Sioux City & St. Paul R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406, 24 Am. & Eng. R. Cas. 100; *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 509, 41 Am. & Eng. R. Cas. 669. Under this last decision the approval of the secretary of the interior is essential to selection. Without it there is no selection in fact. In the language of the opinion in that case, "until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in the title." The same facts which show that the land was exempt from taxation are fatal to the plaintiff's right to maintain this action. The title never having passed from the government, the railway company had none to convey. Plaintiff does not pretend that he has any title except in so far as § 5 of the act of congress, approved March 3, 1887, (24 St. 556,) may confer upon him some kind of title. That section provides, in substance, that the purchaser of such land from the company, having failed to secure any title because the company had none to transfer, may make payment to the United States for such land at the ordinary government price for like lands, and thereupon a patent shall issue to him. This statute certainly does not confer upon him the legal title to the land. That still remains in the United States. Nor is it easy to perceive how the statute can be said to vest in the plaintiff an equitable title to the land. He is a mere settler, with a right to purchase on making a certain payment. It is not pretended that that payment had been made at the time this action was commenced. The plaintiff then had neither a patent nor a right to a patent. He was not in possession under a contract binding the owner of the land to convey to him the legal title. The government had not obligated itself to make such conveyance. It had granted to the plaintiff a concession which it could at any time withdraw. Whatever privilege he held under this act, the government was under no obligation, moral or legal, to continue to respect. He was the recipient of an indulgence,—a favor; but in no sense could he claim to be the owner of any right enforcea-

ble in a court of law or equity. The vendee in a contract for the sale of real estate is, in equity, regarded as the owner, and is therefore said to hold the equitable title because he can compel the vendor to perform his contract. There rests upon the vendor an obligation to perform it which equity will enforce. The plaintiff in this case occupies no such position. He has a mere privilege. If he avails himself of it by the payment of money he will then become the owner of the equitable title to the land, and possibly secure a standing in equity to remove a cloud upon his equitable interest. But we do not decide whether an equitable title is sufficient to warrant the maintenance of an action to remove a cloud therefrom.

Sufficiency of title to maintain action to remove cloud.

There is certainly authority for such a doctrine. See *Hart v. Bloomfield*, 66 Miss. 100; *Sloan v. Sloan*, 25 Fla. 53; *Pom. Eq. Jur.* § 1399, note 4; *Bryan v. Winburn*, 43 Ark. 28; *Lamb v. Farrell*, 21 Fed. Rep. 5; *Emery v. Cochran*, 82 Ill. 65; *Langdon v. Templeton*, 61 Vt. 119. On the other hand there is much which inclines to the more strict rule which requires a legal title to support such an action. See *Frost v. Spitley*, 121 U. S. 552; *Thomas v. White*, 2 Ohio St. 548; *Holland v. Challen*, 110 U. S. 15.

It is further insisted that under the decisions in *Northern Pac. R. Co. v. Rockne*, 115 U. S. 600, 25 Am. & Eng. R. Cas. 364, and *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 509, 41 Am. & Eng. R. Cas. 669, the railroad company could have maintained this action had it not executed a deed of the property to the plaintiff, and that therefore the plaintiff can maintain the action because he has succeeded to the interest of the company in the property. In the case of *Wisconsin Cent. R. Co. v. Price Co.*, *supra*, it appeared that the plaintiff, at the time of instituting its action to set aside the tax proceedings, was the owner of the legal title, although, when the tax proceedings were initiated, such title was still in the state in trust. The land grant of the plaintiff in that case was made by the United States to the state in trust, and, intermediate the levy of the tax and the commencement of the action to annul the tax proceedings, the state executed to the plaintiff a patent for the land in question. This patent was by a state statute *prima facie* evidence of title in the grantee, and the trial court found as a fact that the plaintiff was the owner of the legal title, and this finding was in no manner challenged. The fact, therefore, was undisputed that the plaintiff, when the suit was brought, was the absolute owner in fee of the land over which the cloud rested. In the *Rockne Case*, the court held, not that the legal title was in the railroad, but that the interest of the company, whether legal or equitable,

was subject to a lien in favor of the United States for the unpaid survey fees, and that therefore the land was exempt from taxation by the state; that the tax proceedings, if valid, might result in the destruction of this lien by a sale of the absolute title should the taxes remain unpaid. It is apparent in this case that the court regarded the interest of the company in the land as equivalent at least to an equitable title. Said the court on this point: "The government was as to those costs in the position of a trustee in a conveyance to secure the payment of money." And in *Denny v. Dodson*, 32 Fed. Rep. 899, Mr. Justice FIELD, speaking of the statute giving this lien, and of the decision in the *Rockne Case*, says: "The law was therefore, in effect, an assertion of a lien upon the title papers, and upon the lands, for expenses necessarily incurred for their identification and survey, and in the preparation of conveyances by the government; and the decision of the court [*i. e.*, the *Rockne Case*] was, in substance, that such a lien would not be made available against any taxation or sales thereunder. Notwithstanding the expression referred to, it is not believed that the court intended to hold that a legal title to the lands had not passed by the grant to the company, and thus overrule or qualify a long line of decisions announced after the most mature consideration, and discredit the security which, only a few weeks before, congress had authorized by mortgage on the lands to raise funds to construct the road, but only to declare that the power of disposition by the grantee was stayed by the government until the payment of the costs mentioned was made, and the right of the government to enforce such payment could not be defeated by the tax laws of the territory." It thus appears that in the *Rockne Case* the plaintiff was the owner of at least the equitable title to the land, and, in the other case, of the fee simple, when the suit to remove the cloud was instituted. The cases are not, therefore, in point.

We hold that the tax proceedings are void under the allegations of the complaint, but that the plaintiff has no such interest in the property as entitles him to maintain this action. The order and judgment of the district court sustaining the demurrer are therefore affirmed. All concur.

BARTHOLEMEW, J., having been of counsel, did not sit upon the hearing of the above case, nor participate in the decision herein given.

Land Grant in Presenti—When Grant Attaches to Specific Sections—Issuance of Patents.—The grant of public land to the Northern Pacific Railroad Company by the act of July 2, 1864, 13 Stat. chap. 217, p. 365, was a grant *in presenti*, in the nature of a float until the route should be determined, and, after that, attaching to specific sections, capable of identification, except

as to sections which were specifically reserved. The force of such grant was in no respect impaired, or its construction affected, by the provision in § 4 of that act that patents for the land should be issued as sections of twenty-five miles of the road should be completed; but the company was not at liberty to dispose of its land not patented, without the consent of congress. *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1.

Extent of Grant Dependent on Distance Between Termini—Duty to Construct Road in Direct Line.—When the termini of a railroad for whose construction a land grant is made are mentioned, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1.

Right of Company to Lands Granted after Construction of its Road.—The line of the Northern Pacific Railroad through the state of Minnesota having been definitely determined in accordance with law, and the road having been constructed, the company's right to the lands in place along the line of its route as so located, and to other lands to make up deficiencies, cannot be doubted, unless a prior right attached to those lands under an earlier grant from congress. *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1.

Filing Map showing Definite Location—Withdrawal of Land from Sale or Entry—Lieu Lands.—The Southern Pacific Railroad Company filed its map of definite location on the 3d of January, 1867, in the office of the commissioner of the general land-office, showing the present granted and indemnity limits thereon, which granted and indemnity limits are clearly defined in the act of congress; and the indemnity belt is particularly limited to specified boundaries outside of the granted limits. *Held*, that upon filing the map of definite location, and upon the secretary of the interior issuing his order withdrawing all the lands within 40 miles of the line of the road, the odd numbered sections both within the present granted and indemnity limits were withdrawn from pre-emption, homestead entry or any other disposition by the government. Furthermore *held*, that the statute itself in terms provides that the odd sections shall not be liable to sale or entry or pre-emption other than to the company. Congress intended to withdraw from sale, entry or pre-emption all those lands set apart within specifically defined limits, as well those authorized to be selected as lieu lands, as those absolutely granted, in which the title itself presently vested. The right of selection indefeasible by pre-emptioners vested upon filing the map of definite location, and withdrawal, as provided by the statute, although the title to the land itself did not vest till the selection. The secretary of the interior had no authority, while a deficiency existed, to allow a pre-emption to be made upon an odd section within these indemnity limits. While such deficiency existed, the secretary could not throw open the odd sections within the indemnity limits to pre-emption, or homestead entry. The right of selection, in the company, to these lands, is given in the statute itself, and the secretary cannot revoke it. *Southern Pac. R. Co. v. Wiggs*, 43 Fed. Rep. 333.

Exception of Mineral Land from Land Grant—Meaning of Term "Mineral Land."—Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect or which there was then satisfactory reason to be believed to be such. *Francoeur v. Newhouse*, 43 Fed. Rep. 236.

Construction of Part of Road only—Company Entitled to Proportional Part of Grant.—Act Cong. May 12, 1864, granted to the state of Iowa, for the purpose of aiding in the construction of a railroad from Sioux City to the Minnesota state line, and from a point on such road to South McGregor, every alternate section of land for 10 miles from such roads not otherwise

disposed of, with indemnity for such disposed of land. The former road was built, except a part where all the granted land had been previously sold. *Held*, that said road was only entitled to such part of the grant as was proportioned to the part of the road that was built. Said road having been decreed to be entitled to only a moiety of the land included in the grant to both roads, it is entitled to indemnity for the moiety thus lost. *United States v. Sioux City & Pac. R. Co.*, 43 Fed. Rep. 617.

Erroneous Selection of Land—Confirmation by Congress—Right to Maintain Ejectment.—Where, under a grant of public lands to aid in the construction of a canal, a selection is made of lands which had been appropriated under a prior grant, and so were not subject to selection under the later one, a subsequent act of congress confirming the lands to the canal company does not relate back to the date of selection so as to enable that company to maintain ejectment for the lands brought before the passage of the confirming act. *Lake Superior Ship Canal R. & Iron Co. v. Cunningham*, 44 Fed. Rep. 587.

Reservations—Indemnity Lands—Construction of Grant to Wisconsin Central R. Co.—Congress, by an act approved June 3, 1856 (11 St. 20), granted to Wisconsin, to aid in the construction of "a railroad from Madison or Columbus, by the way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior, and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads, respectively, "with indemnity limits of 15 miles from each road; the lands unsold to revert to the United States, unless the roads were completed within 10 years. In anticipation of the passage of that act, the commissioner of the land-office, May 29, 1856, directed the registers and receivers of the districts in which these lands were to suspend sales and locations until further orders. This grant was duly accepted by the state, and the benefit of it conferred upon a railroad company. The map of definite location of the Bayfield branch was filed July 17, 1858, and was approved. After the final location of that branch, the commissioner of the land-office made an order withdrawing and reserving from entry and location all the odd-numbered sections, outside the 6 and within the 15 mile indemnity limits of certain roads, described in the act of 1856, excluding the Bayfield branch. Prior to May 5, 1864, nothing had been done under the act of 1856, except to construct the road from Portage to Tomah, and to definitely locate the Bayfield branch. On that day congress passed another act, granting to the state, "for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin, for the same purpose," by the act of congress of June 3, 1856, "upon the same terms and conditions" as are contained in the latter act, with indemnity limits of 20 miles. The second and third sections granted to the state a like amount of place limits, with like indemnity limits, to aid in the construction of railroads, respectively, from Tomah to the St. Croix river or lake, and from designated places in the eastern part of the state, in a northwesterly direction to Bayfield, and thence to Superior, on Lake Superior. But its sixth section provided: "That any and all lands reserved to the United States by any act of congress for the purpose of aiding in any object of internal improvement, or in any manner, for any purpose whatsoever, and all mineral lands, be, and the same are hereby, reserved and excluded from the opera-

tion of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the president of the United States." 13 St. 66. The road described in the third section of the act of 1864 was constructed by the Wisconsin Central Railroad Company, and that company became entitled to the benefit of the grant made by that section. Its road was definitely located November 10, 1869. The road extending from a point north of St. Croix river or lake to Bayfield belongs to what is called the "Omaha Company." The lines of that road and of the Central road approach each other as they, respectively, approach Lake Superior, so that the place limits of the Central road overlapped the original 15-mile indemnity limits of the Bayfield branch of the Omaha Company. Those two companies entered into an agreement whereby the Central Company was to have patents for all the lands in the overlap lying east of the easterly 10-mile limit of the Bayfield branch of the Omaha Company, and north and east of the westerly 10-mile limit of the Central road, while the Omaha Company was to have all the other lands within the overlap of the grants. The Central Company got patents from the state for all the lands situated on either side of, and coterminous with, said completed portions of its road. These patents covered the lands in dispute, which are outside and east of the enlarged place limits (10 sections in width on each side of the Bayfield branch), and within the 15-mile indemnity limits of that road. They are also within the 10-mile place limits of the Central road, as defined by the act of 1864. The Central Company received from the Omaha Company a deed of release covering those lands and others similarly situated. In 1887 the Omaha Company had a final adjustment of its land grant, when Secretary Lamar ruled (6 Dec. Dep. Int. 190) that the lands within the original indemnity limits of the Bayfield branch, as defined in the act of 1856, were, by orders of the secretary, "reserved to the United States" at the date of the passage of the act of 1864, and therefore were not included in the grant by that act. Upon a rehearing of that question before Secretary Noble (10 Dec. Dep. Int. 63) the same ruling was made. After these rulings, the lands here claimed by the Central Company were entered under the homestead and pre-emption laws of the United States, and patented to the defendant. *Held* (1) The purpose of the act of 1864 was to break the continuity of the original line from Tomah, via St. Croix river or lake, to the west end of Lake Superior and to Bayfield, and to devote to the construction of separate and distinct portions of that line an increased quantity of lands beyond the amount granted by, or which could have been made available under the act of 1856. (2) The act of 1864 did not wholly displace the act of 1856, and make an entirely new, independent grant as of its date of the place lands to the extent of 10 full sections in width on each side of the particular roads therein mentioned, with indemnity limits of 20 miles, but, in legal effect, granted 4 additional sections in width of place lands, with indemnity limits enlarged from 15 to 20 miles, and confirmed the previous grant of 6 sections in width of place lands, with 15 miles indemnity limits; in other words, as to the Bayfield road, it converted 4 miles of the original indemnity limits, as defined in the act of 1856, into place limits, and added 5 miles on each side of the place limits, thus enlarged, to the indemnity limits, leaving untouched in all other respects the original grant of lands for that road. (3) Except as to that part of the indemnity lands converted by the first section of the act of 1864 into place lands of the Bayfield road, the orders of the secretary of the interior, made prior to that year, withdrawing from sale and location for the benefit of that road its entire indemnity lands, was not abrogated or annulled by that act, congress not intending to deprive

the Bayfield road of any part of the original indemnity lands. (4) The lands within the original indemnity limits of the Bayfield road, embraced in the withdrawals from sale and location by the secretary of the interior, prior to the passage of the act of 1864, were not granted by, but were excluded from the operation of, that act, because, within its meaning, and according to the decisions of the supreme court, they had been, and then were, by reason of such withdrawals, "reserved to the United States."

(5) Although the object of such withdrawals, namely, to supply deficiencies in the place limits of the Bayfield road, was fully satisfied by the adjustment made with the Omaha Company of the grant for the benefit of that road, the lands so withdrawn, although falling within the outer lines of the place limits of the Central road, did not become the property of the Central Company, because, having been "reserved to the United States" prior to 1864, they were excluded altogether from the operation of that act, and could not be brought under it by reason of their not being finally needed for the Bayfield road. (6) The agreement between the Omaha and Central Companies, and the deed of release from the former to the latter company, was of no avail, as against the United States, because the Omaha Company acquired no legal interest in the lands in dispute which it could transfer to the other company, the lands never having been selected and set apart by the land department for the Bayfield road. Until indemnity lands are so specially selected and set apart, the title and right of property therein remains in the United States. *Wisconsin Central R. Co. v. Forsythe*, 43 Fed. Rep. 867.

Company Entitled to Full Amount of Land Granted.—The act of congress of July 27, 1866, granting lands to the Southern Pacific Railroad Company, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location and building and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land to the amount of 10 alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant, or indemnity limits. *Southern Pac. R. Co. v. Wiggs*, 43 Fed. Rep. 333.

Exceptions in Grant of Subsequent Grants Prior to Definite Location of Road.—The exception, in the grant to the Northern Pacific Railroad Company, of all subsequent grants prior to the definite location of its road, was not intended to cover other grants for the construction of roads of a similar character. *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1.

Interest in Granted Lands not Acquired after Withdrawal from Sale.—After the withdrawal from sale or preemption of the granted odd sections, no interest in the granted lands, adverse to the rights of the company, could be acquired by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route was fixed. *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1.

Land Procured by Company for Finished Sections Although Entire Road is not Completed.—In *St. Paul & Pac. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, it was held that in order for the Northern Pacific Railroad Company to secure land granted it in the sections through which its road was finished, it was not necessary that the road, throughout its whole length, should be fixed; but the general purpose of the act was accomplished if such reasonable portions of the general route were located as would intelligently guide the officers of the Land Department with reference to the patents to be issued for lands intended for the company.

Selections of Sufficiency Lands by Railroad Company—Relation back of Title—Action against Trespassers.—Where an act of congress granting lands to the state of Wisconsin in aid of railroads provided that it should be lawful for agents appointed by the railway company entitled to the grant to

select, subject to the approval of the secretary of the interior, from the public lands of the United States, "deficiency" lands within certain defined indemnity limits, *held*, that the issuance of a patent by the United States directly to the railway company for lands so selected by an agent of the company was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States at the date thereof. And where it appeared that after certain deficiency lands had been earned by the railway company, and had been so selected and duly certified to the general land-office, but, prior to the issuance of the patent, timber had been wrongfully cut and removed therefrom by trespassers, *held*, that the title acquired by the patent must be held to relate back to the selection of the land, so as to save to purchasers to whom the lands had been granted by the company, before the trespasses, a right of action for the timber wrongfully removed from the land, or its value. *Musser v. McRae*, 44 Minn. 343.

Conditions Imposed on Land Grant—Acceptance by Company—Relinquishment of Claim to Land Settled upon.—When a statute extends the time for the completion of a land grant railroad, upon the condition of saving and securing to actual settlers and their grantees on any of the granted lands their rights in all respects the same as if said lands had never been granted to aid in the construction of said lines of railroad, and the company asserts and continues to assert and exercise ownership over the road and other property, after the expiration of the time for completing the road, to the same extent as previously, it will be presumed, in the absence of proof to the contrary, that the company has accepted the conditions imposed, and that it has relinquished all claim to the lands thus settled and occupied. *St. Paul, Minneapolis & M. R. Co. v. Greenalgh*, 139 U. S. 19.

Land Granted to Territory of Minnesota and to State of Minnesota—When Grants Took Effect.—The grant of lands to the Territory of Minnesota by the act of March 3, 1857, 11 Stat. 195, chap. 99, and the grant to the state of Minnesota by the act of March 3, 1865, 13 Stat. 526, chap. 105, were grants *in presenti*, and took effect by relation upon the sections of land as of the date of the grant, when the railroads were definitely located, both as to so much of the grants as was found within the limits of the state of Minnesota as defined by the act admitting it as a state, and as to so much thereof as was within the limits of the Territory of Minnesota under the territorial organization of 1857, but was not within the limits of the state when admitted as a state. *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528.

Grant of Land to State in aid of Railroad—Lands Outside of State—Policy of United States.—It cannot be safely asserted that it has been the general policy of the United States government to restrain a grant of land made to a state in aid of railways, to lands within such state, when a part of the line of road extends into one of the territories, where the language of a series of statutes is dubious, and open to different interpretations, the construction put upon them by the Executive Department charged with their execution has great and generally controlling force with this court; but where a statute is free from all ambiguity, the letter of it is not to be disregarded in favor of a presumption as to the policy of the government, even though it may be the settled practice of the department. *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528.

Grant of Lands to Territorial Corporation—Part of Territory Subsequently Becoming State.—Congress may authorize a territorial corporation to construct a railroad in a territory, and may make land grants in aid thereof, which will be valid after a part of the territory becomes a state. *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528.

Grant to State in Aid of Railroads—Sale by Railroad without Authority—Ratification.—Under the Acts of Congress granting public lands in Alabama in aid of railroads (U. S. Stat. at Large, Vol. 11, p. 17; 16 *Id.* 45), the legal title to the lands was vested in the state as trustee, for the purposes mentioned, and might be conveyed by it to several railroad companies, subject to the restrictions imposed by the act of congress; but, having conveyed the lands subject to these restrictions, which gave a conditional right of sale, the state could not ratify and sanction a sale made in violation of those conditions, nor has it done so in regard to the lands acquired by the Alabama & Chattanooga Railroad Company, some of which were afterwards sold by the agents of that company without authority; and sub-purchasers of those lands, being sued by the railroad trustees, cannot enjoin the action in equity on the ground that the purchase money paid was used in completing the road. *Miller v. Swann & Billups*, 89 Ala. 631.

Same—Transfer by State to Wrong Company—Constructive Fraud—Limitation of Action.—Where a railroad company has complied with an act of congress granting land to the state of Minnesota for railroad purposes, and with the state law transferring the grant to it, a transfer by the state to another company is a constructive fraud, as the lands are held by the state in trust for the former company; and an action to recover such lands is not governed by Gen. St. Minn., chap. 66, tit. 2, § 6, subd. 7, which specifies the period of limitation for "actions to enforce a trust or compel an accounting," but by subd. 6, which relates to actions "for relief on the ground of fraud," and specifies that the cause of action shall not be deemed to have accrued until a discovery of the fraud. *Sage v. St. Paul, Stillwater & T. F. R. Co.*, 44 Fed. Rep. 817.

Ejectment by Party deriving Title from Railroad Company against Prior Occupants—What must be Shown.—In ejectment by one deriving title from a railroad company to lands granted it by congress and for which no patent has been issued, where the defendant is in actual possession, the plaintiff must prove compliance by the railroad company with the requirements of the act, and that the land in controversy is not within its exceptions. *Corinne Mill, Canal & Stock Co. v. Johnson* (Utah, June 5, 1891), 13 26 Pac. Rep. 922.

Grant of Land by City—Designation of Use—Compliance with Terms.—Where land was granted to a railroad company, so long as the same should be used "for shops, depots, and other conveniences and fixtures necessary for said company," and the only use made of the land was the building and maintenance thereon of a track or tracks for the purpose of conveying freights to private parties, the storage of cars, and other like uses, this would not be a compliance by the company with the terms of the grant. *Georgia R. & B. Co. v. Mayor, etc., of Macon* (Georgia, Feb. 2, 1891), 13 S. E. Rep. 21.

Same—Action by City against Company succeeding Grantee.—The city of Macon granted to the M. R. Co., certain lands to be used for a certain purpose. The condition of the grant was never complied with. The M. & A. R. Co. was the legal successor of the M. R. Co., and took possession of a portion of the land and built and used tracks thereon, but did nothing more. The G. R. & B. Co. afterwards took possession of the land. The title of the land was in the city, except so far as it might be affected by the terms of the grant. *Held*, that the city was entitled to recover the land from the G. R. & B. Co., as a mere wrongdoer, unless it showed some right to hold under the M. & A. R. Co., or if it did show such right, then the city was entitled to recover for want of compliance with the terms of the grant, and in either event no demand was necessary as a condition precedent to the city's bringing its action for the land. *Georgia R. & B. Co. v. Mayor, etc., of Macon* (Georgia, Feb. 2, 1891), 13 S. E. Rep. 21.

Grant by City of Land under Water—Obstruction of River Front of Adjacent Owners.—The construction by the Hudson R. Co. of its railroad, along the Hudson river upon land, partly under water, conveyed to it for that purpose by owners of the adjoining uplands fronting on the river, did not authorize a grant to that company of lands under water beyond its railroad, under Rev. St. N. Y. (7th Ed.) p. 573, § 67, which forbids grants of lands under water "to any person other than the proprietor of the adjacent land." The title of that company under such a grant to it, as against a subsequent grant of the same lands to the owners of the adjacent upland, is good only within the purposes of the company's charter; and such owners may recover damages for the cutting off of their means of access from their uplands to the river. *Rumsey v. New York & New England R. Co.* (New York, Dec. 2, 1890), 25 N. E. Rep. 1080.

Grant of Right of Way through Public Land—Interest Acquired—Right of Company to Possession.—The Act of Congress of July 1, 1862, granting to the Central Pacific Company a right of way two hundred feet in width on each side of its road, did not grant a mere easement for the construction and operation of its road, but operated as a special grant of land, and is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and gave to the grantee the exclusive right to the possession of all the land embraced in the grant of such right of way; and the railroad company may maintain an action of ejectment to recover possession of the whole of the four hundred feet so granted, although only occupying a small portion thereof for its roadbed. The right of such railroad company to recover the land so granted is not affected by the fact that it offered to lease to defendant the parcel in dispute, as the defendant had no right to inclose or occupy the land without permission of the railroad company. *Southern Pacific R. Co. v. Burr*, 86 Cal. 279.

BYBEE

v.

OREGON & CALIFORNIA R. CO.

(139 *United States*, 663.)

Land Grant—Condition Subsequent—How Forfeiture takes Effect.—The provision in an act of congress granting land to a railroad company (Act of July 25, 1866, 14 St. 239, chap. 242, § 8,) that in case the company should fail to complete its road on or before a certain time the "act shall be null and void" and all lands not conveyed by patent at the date of such failure shall revert to the United States, is a condition subsequent, of which only the United States can take advantage, and no forfeiture takes effect without some action on their part.

Water Right through Public Lands—Prior Grant of Land to Railroad Company.—One who acquires a right to a water ditch and water right over public lands under the Act of Congress of July 26, 1866, but after the grant of a right of way to a railroad company, takes such right subject to the prior right of the railroad company, and cannot recover the damages that may be necessarily occasioned to him by its entry on the right of way granted to it.

Same—Conveyance by Owner of Water Right to Railroad—Estoppel of Company to Deny his Title.—Plaintiff constructed a ditch, under the above

statute, over lands granted by congress to a railroad company. The company under a misapprehension of its legal rights accepted a deed of the right to construct its road over such person's ditch, and paid him therefor. The deed was granted on condition that the ditch should not be impaired or destroyed. After the construction of the road plaintiff sued the company for so constructing its road as to permanently obstruct and destroy the ditch. *Held*, that the railroad company by accepting the deed was not estopped from denying the title of the owner to the ditch, or from asserting the invalidity of the covenant into which it had inadvertently entered.

Affirming 24 Am. & Eng. R. Cas. 127.

IN error to the Circuit Court of the United States for the District of Oregon.

This was an action originally begun in the state-court for Jackson county, Or., and removed to the circuit court of the United States upon the petition of the defendant, upon the ground that the case involved the validity of conflicting grants of land from the United States. The plaintiff sued to recover for damages to a water-ditch and water-right, occasioned by the construction of the defendant's road. His complaint alleged, in substance, that on the 3d of September, 1883, he was the owner of an undivided half of a certain water-ditch and water-right on the south side of Rogue river, in Jackson county, and in lawful possession of the same, as tenant in common with one Daniel Fisher; that upon this day the plaintiff and Fisher, for the consideration of \$250 paid to them, executed a deed to defendant of a right to construct and operate its railroad and telegraph line across the said water-ditch, but upon condition that it should not in any way destroy or injure the same, or obstruct their use and enjoyment of it as a means of conveying water through the same; and that the defendant accepted the deed, received possession of the water-ditch, and constructed its railroad and telegraph line across the same, but in such a manner as to permanently obstruct and destroy it, and render it impossible to use it for the conveyance of water, and refused to make any compensation to the plaintiff for his interest therein.

The answer of the defendant in substance denied the ownership of plaintiff and Fisher in any portion of the water-ditch or water-right alleged to have been destroyed by the defendant, and denied their lawful possession thereof. It further denied that the deed set forth in the complaint contained any condition whatever, or that defendant ever assented to any condition connected with such deed, or received possession of the ditch under this deed: and alleged as a separate defense to the complaint that it was incorporated to construct and operate a railroad and telegraph line from Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue river valleys to the California

line on the southern boundary of Oregon. That by section 3 of an act of congress, approved July 25, 1866, there was granted to it a right of way through the public lands of the United States, to the extent of 100 feet in width on each side of the said railroad where it might pass through such lands. That the lands through and over which the portion of the said water-ditch, alleged to have been injured by defendant, was constructed and is situated, were at the date of said act public lands of the United States, over and upon which the defendant had the right, by virtue of the grant made in that act, to locate its right of way and construct its railroad and telegraph line. That in locating said right of way and constructing said road it became necessary for the defendant to appropriate to its use 100 feet in width on each side of its road, through and over which said land a portion of said water-ditch alleged to have been injured by defendant was located and constructed, and that the defendant did accordingly locate its right of way over the ground through which the water-ditch was dug, and constructed its road over such right of way; and that any injury which may have been done to said ditch was done in the course of such construction.

The answer further alleged that on May 17, 1879, the said Daniel Fisher attempted to appropriate to his own use, under the mining laws of the United States, a portion of said right of way, and constructed thereon the said ditch; that the only claim of right ever made by Fisher to locate and dig that portion of such ditch was obtained by virtue of his pretended compliance with certain provisions of the mining laws; that he had no other interest or ownership in such land than the right so acquired, and plaintiff's only interest therein was acquired under and through said Fisher; and that defendant took nothing by the deed mentioned in the complaint, as it then owned, by virtue of the said grant of the United States, all the rights and property pretended to be conveyed by said deed, and never received any consideration whatever for the sum alleged to have been paid by it for such pretended conveyance.

To this separate defense in the answer the plaintiff demurred, upon the grounds (1) that it did not state facts sufficient to constitute a defense; (2) that the facts stated in the complaint estopped the defendant from setting up the right of way mentioned in such defense, or any benefit under the congressional grant of the right of way of July 25, 1866, set forth in such defense; (3) that the defendant had forfeited and lost all its right under such grant over the land where the ditch was situated by its failure to complete its railroad on or before the 1st day of July, 1875, and had at no time

since owned any right or interest in such land or right of way over the same.

The court below overruled the demurrer in an opinion reported in 24 Am. & Eng. R. Cas. 127, 11 Sawy. 479, 26 Fed. Rep. 586, and the plaintiff not desiring to plead further, entered a final judgment in favor of the defendant, to reverse which the plaintiff sued out this writ of error.

John H. Mitchell, for plaintiff in error.

C. H. Tweed, and *J. Hubley Ashton*, for defendant in error.

BROWN, J.—Two questions are presented by the record in this case: *First*, whether the defendant lost the power to take possession of its right of way by its failure to construct its road within the time limited by the acts of congress; and, *second*, whether it is estopped to claim that it took nothing under its deed from the plaintiff, and may set up a separate and independent title in itself. Questions presented.

1. By section 2 of an act of congress approved July 25, 1886, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," (14 St. 239,) there was granted to such company organized under the laws of Oregon, as the legislature of said state should thereafter designate, to aid in the construction of its road, "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile," not otherwise disposed of by the United States, with the right to select from the odd sections, within 10 miles beyond the limits of the granted lands, other lands in lieu of any which might have been so disposed of prior to the location of the line; and by section 3 there was granted to it the right of way through the public lands, to the extent of 100 feet in width on each side of said railroad, where it might pass over the public lands, including all necessary grounds for stations, etc. Act granting land.

By § 6 the companies were required to file their assent to the act within one year; to complete the first 20 miles within two years, and at least 20 miles in each year thereafter, and the whole on or before the 1st of July, 1875.

Section 8 provided that in case the company should not complete the same as provided in § 6, "this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States;" but by a subsequent act of June 25, 1868, (15 St. 80,) the time for completing the road was extended to July 1, 1880.

That the company did not complete its road by the time lim-

ited by act of 1868, namely July 1, 1880, is conceded by both parties, and is evident from the fact that the defendant took this deed from the plaintiff on December 3, 1883, wherein, for the consideration of \$250, it was agreed that the defendant might enter upon plaintiff's water ditch, and construct and operate its railroad and telegraph line over the same. Indeed, it appears to have been a matter of such common knowledge in the state of Oregon that the road was not constructed until after 1880 that the court below was inclined to take judicial notice of the fact.

The act making the grant in aid of this road does not, in its words of conveyance, differ materially from a large number of similar acts passed by congress in aid of the construction of roads in different parts of the west, which have been considered by this court as taking effect *in præsenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located, and the map is filed with the secretary of the interior. The act then operates as a grant of all odd numbered sections within the limits, except so far as they may have been in the meantime "granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of." And in all the cases in which the question has been passed upon by this court, the failure to complete the road within the time limited is treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of congress, resuming title to the lands. Thus, in *Schulenberg v. Harriman*, 21 Wall. 44, the act of congress granting the lands provided in what manner the sales should be made, and enacted that if the road were not completed within 10 years no further sales should be made, and the lands should revert to the United States. That was decided to be no more than a provision that the grant should be void if the condition subsequent were not performed. Said Mr. Justice FIELD in that case: "It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. * * * And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed." The doctrine of this case was ap-

Forfeiture—
Failure to
complete road
not itself a
revocation.

proved and reapplied to a similar grant to the St. Joseph & Denver City Railroad, in *VanWyck v. Knevals*, 106 U. S. 369, 10 Am. & Eng. R. Cas. 664. In *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 469, 473, 26 Am. & Eng. R. Cas. 525, it was said by Chief Justice WAITE to have been often decided "that lands granted by congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. "Legislation to be sufficient must manifest an intention by congress to reassert title and to resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and judgment therein establishing the right, it should be direct, positive, and free from all doubt or ambiguity." The manner in which this forfeiture shall be declared is also stated in *United States v. Repentigny*, 5 Wall. 211, 267; *Farnsworth v. Minnesota & Pac. R. Co.*, 92 U. S. 49, 66; *McMicken v. U. S.*, 97 U. S. 204, 217.

An effort is made to distinguish this case from *Schulenberg v. Harriman*, in the fact that the act not only declares that the lands "shall revert to the United States," but that the act itself "shall be null and void," from which it is argued that it was the intention of congress that the failure to complete the road should operate *ipso facto* as a termination of all right to acquire any further interest in any lands not then patented. It is true that the language of this statute differs somewhat from that ordinarily employed by congress in connection with similar grants; but the declaration that the lands "shall revert to the United States" is practically equivalent to a declaration that the act granting such lands shall cease to be operative if the company fail to complete its road within a specified time, or, as Mr. Justice FIELD puts it in *Schulenberg v. Harriman*: "The provision in the act of congress of 1856, that all lands remaining unsold after ten years shall revert to the United States if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent be not performed." The title to the land having vested in the company by virtue of the grant, the provision that it shall complete the road within a certain number of years does not cease to be a condition subsequent by declaring that the act shall be null and void, if the condition be not complied with.

And the law is well settled that it is only the grantor, or those in privity with him, who can take advantage of the forfeiture. Indeed, the provision that "this act shall be null

and void" is immediately followed by words indicating that it is only to a limited extent—that is, so far only as lands not already patented are concerned—that the nullity of the act extends, the language being: "This act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States." As to lands theretofore patented the act continued in full force and effect. As remarked by the learned judge of the court below: "It is to become 'null' only so far as to allow the grantor to presume, the grant on a failure to comply with the condition, and then only as to the lands remaining unpatented or unearned; and, but for this qualification, the grant might have been wholly resumed or forfeited for any failure to comply with the condition, even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of congress in making the grant." A condition that would put it beyond the power of the company to build the last mile of its road by the aid of the granted lands is manifestly so harsh and unjust that the breach of such condition ought not to be treated as a forfeiture, unless the language of the act be so clear and unambiguous as to admit of no other reasonable construction.

Counsel for plaintiff has called our attention to several cases decided by the court of appeals of New York which doubtless have a bearing upon this question, but which, when carefully examined, are readily distinguishable. *In re Brooklyn, etc., Ry. Co.*, 72 N. Y. 245; *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524; *Union Hotel Co. v. Hersee*, 79 N. Y. 454; *Farnham v. Benedict*, 107 N. Y. 159. In these cases the legislative act did not avoid the grant upon the non-performance of the condition subsequent, but declared that the corporate existence and powers of the company to act were at an end. In other words, it fixed a time for the expiration of the charter, and, when that time arrived, the corporation lost its power to act or do any business beyond such as was necessary in the process of winding up. It was not so much a case of forfeiture as of loss of legal entity, or, as expressed in the language of the court of appeals in the case in 78 N. Y., "in case of non-compliance, the act itself ceases to have any operation, and all the powers, rights, and franchises thereby granted were deemed forfeited and terminated. There was to be not merely a case of forfeiture, which could be enforced by an action instituted by the attorney general, but the powers, rights, and franchises were to be taken and treated as forfeited and terminated. At the end of the time limited the corporation was to come to an end, as if

that were the time limited in its charter for its corporate existence."

More directly in point is the case of *Oakland R. Co. v. Oakland, B., etc., R. Co.*, 45 Cal. 365. In this case an act of the legislature granting a corporation the right of way to lay a street railroad track provided "that, if the provisions of this act are not complied with, then the franchise and privileges herein granted shall utterly cease to be forfeited." A breach of this condition was held *ipso facto* to forfeit the franchises of the corporation. A distinction was drawn in this case between forfeitures at common law, which did not operate to divest the title of the owner until by proper judgment in a suit instituted for that purpose the rights of the state had been established, and a forfeiture declared by statute, in which case the title to the thing forfeited vests immediately in the state upon the happening of the event for which the forfeiture is declared.

The doctrine of these cases has not been universally accepted, however, and in several states, notably in Massachusetts, it has been distinctly repudiated. Thus, in *Briggs v. Cape Cod Ship Canal Co.*, 137 Mass. 71, the act of incorporation of a canal company provided that, if a certain amount were not expended in the actual construction of the canal within four months from the passage of the act, the "corporation shall thereupon cease to exist;" and further, that, if a certain other amount were not deposited by the company with the treasurer of the commonwealth within the same time, the corporation should thereupon cease to exist. It was declared in the opinion of the court to be "too well settled to admit of discussion that a corporation can be judicially determined to have ceased to exist only in a suit to which the commonwealth is a party. The act of incorporation is a contract between the commonwealth and the corporation. Whether the corporation has complied with the conditions is a question of fact to be judicially determined. The commonwealth may waive a strict compliance with the terms of the act, and may elect whether it will insist upon a forfeiture, if there has been a breach of condition; citing a number of prior cases in the same state.

In *Atchafalaya Bank v. Dawson*, 13 La. Ann. 497, an act for the incorporation of a bank provided that upon the suspension or refusal of payment in specie for more than 90 days "the charter shall be *ipso facto* forfeited and void." But it was held that until the forfeiture was judicially decreed, neither the forfeiture nor the cause could be inquired into in another suit, nor could the existence of the corporation be questioned incidentally or collaterally. To the same effect is

the case of *Lagrange & Memphis R. Co. v. Rainey*, 7 Cold. 420. In this case it was held that if an act of incorporation fixes a definite time in which the charter shall expire, when the time for this expiration arrives the corporation is dissolved. But if its continuance beyond a fixed time is made to depend upon the performance of a given condition, the non-performance of the condition is a mere ground of forfeiture. "This, however, can only be taken advantage of by the state in a proceeding in the nature of a *quo warranto*, and the existence of the corporation can never be collaterally called in question." It is not indeed, always easy to determine whether a condition be precedent or subsequent. It must depend wholly upon the intention of the parties as expressed in the instrument, and the facts surrounding its execution. If the condition does not necessarily precede the vesting of the estate, or if, from the nature of the act to be performed, and the time required for its performance, it is evident that the intention of the parties is that the estate shall vest, and the grantee shall perform the act after taking possession, then the condition is treated as subsequent, and there is no forfeiture without a re-entry by the grantor, or, in the case of the state, without some action on its part manifesting an intention to resume its title. In the case under consideration, the act, as already stated, takes effect as a present grant, and the provision for a forfeiture in case the company fails to complete its road is clearly a condition subsequent.

Upon the whole, we think there is nothing to distinguish this case from *Schulenberg v. Harriman*, and that the learned judge of the court below was correct in holding that the railroad company had not forfeited its right to construct its road by failure to complete the same within the time limited.

The distinction between a right of way over the public lands, and lands granted in aid of the construction of the road, is important in this connection. As to the latter, the rights of settlers or others who acquire the lands by purchase or occupation between the passage of the act and the actual location and identification of the lands, are preserved unimpaired, while the grant of the right of way is subject to no such condition; and in the construction given by this court to a similar grant in *St. Joseph & Denver City R. Co. v. Baldwin*, 103 U. S. 426, 2 Am. & Eng. R. Cas. 510, a person subsequently acquiring any part of such right of way takes it subject to the prior right of the railroad company. As remarked by the court in that case (p. 430): "If the company could be compelled to purchase its way over any sections that might be occupied in advance of its location, very serious

Distinction
between
grant of right
of way and
land grant.

obstacles would be imposed to the progress of the road. For any loss of lands by settlement or reservation other lands are given; but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route."

The only title which the plaintiff seems to have had to the land in question was by virtue of an appropriation or occupation of the same under the act of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes." 14 St. 251. But as his occupation dates only from May, 1879, long after the defendant company had become entitled to its right of way over these lands by virtue of the act of July 25, 1866, his claim was clearly subordinate to that of the railroad company. Under this act the plaintiff acquired no right to any portion of the public lands until his actual taking possession of the same for the purpose of constructing a ditch, and in so doing he took the risk of encroaching upon the right of way which the railroad company might thereafter select for the purposes of their road. This very question arose in the supreme court of California, in the case of *Doran v. Central Pac. R. Co.*, 24 Cal. 245, in which the court observed (page 259) that "the grant by congress of the right of way over any portion of the public land to which the United States have title, and to which private rights have not been attached under the laws of congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry." We regard this exposition of the law as sound, and the case as exactly in point in this connection.

Plaintiff's
claim subor-
dinate to de-
fendant's.

2. With regard to the question of estoppel, the complaint alleges that the defendant went into possession of that portion of the plaintiff's ditch across which its road was constructed, under a deed from plaintiff and his tenant in common, for a consideration of \$250 paid, and assented to the condition therein contained against impairing or destroying said ditch, the only right conveyed being a license "to enter on said ditch and construct and operate its road over the same," upon such condition. The contention of the plaintiff is that in receiving this deed and entering into possession the relation of landlord and tenant was created between them, and not that of vendor and vendee, so far as the doctrine of estoppel is concerned. But as the deed was the conveyance

Estoppel of
defendant by
acceptance of
deed.

of a perpetual right for a solid consideration therein expressed, and there was no covenant for the payment of any rent, nor for the redelivery of possession, we think it should be regarded as creating the relation of grantor and grantee between the parties thereto. We have already found that the title of the company to its right of way upon the location of its route related back to the date of the act, and hence that when it took possession of the land in question plaintiff had no title thereto which he could set up against the company. Had the defendant not accepted the deed from the plaintiff, it might, under our ruling upon the first point, have treated him as a trespasser. The real question, then, is whether the defendant is placed in a worse position by having accepted the deed from a party who had no title to the premises he assumed to convey,—the defendant having taking the conveyance under a mistaken view of the law applicable to the case.

It is conceded that, as a general principle, the grantee in a deed of conveyance is not estopped to deny the title of his grantor, and, unless this case be an exception to this rule, it will necessitate an affirmance of this judgment. The rule was first applied by this court in the case of *Blight's Lessee v. Rochester*, 7 Wheat. 535, in favor of the grantee, who was permitted to show that the person from whom he derived title was an alien, and under the laws then existing, incapable of transmitting by inheritance the title to lands in this country. In *Merryman v. Bourne*, 9 Wall. 592, it was stated that the vendee "holds adversely to all the world, and has the same right to deny the title of his vendor as the title of any other party;" and in *Robertson v. Pickrell*, 109 U. S. 608, it was held, in an elaborate opinion by Mr. Justice FIELD, that defendants, who held under a deed of a life-estate, were not estopped from setting up a superior title. Cases in the state courts to the same effect are *Comstock v. Smith*, 13 Pick. 116; *Osterhout v. Shoemaker*, 3 Hill, 518; *Clee v. Seaman*, 21 Mich. 287; and *Sparrow v. Kingman*, 1 N. Y. 242.

Upon the other hand, there are doubtless some exceptions to the rule, arising out of circumstances which would render the repudiation of the grantor's title "a breach of good faith and common honesty" on the part of the grantee. Thus he cannot refuse to pay the consideration named in his deed, nor probably to perform any other strictly personal covenant; nor, as remarked by the court in *Robertson v. Pickrell*, can the grantee, in a contest with another, while relying solely upon the title conveyed to him, question its validity when set up by the latter. In other words, he cannot assert that the title obtained from his grantor, or through him, is

sufficient for his protection, and not available to his contestant. Where both parties assert title from a common grantor, and no other source, neither can deny that such grantor had a valid title when he executed his conveyance. Thus in *Wilcoxon v. Osborn*, 77 Mo. 621, it was stated that the rule was not applicable to a case where the only title asserted by the grantee was the precise title he had acquired from the grantor, nor to a case where both parties claimed from a common source, and the title was identical in that source. In that case a county, having received the purchase money for a tract of swamp land, caused a deed to be made to the purchaser by the county commissioner. On the same day the county made a loan of school funds, taking as security a mortgage on the land. Subsequently the county caused the mortgage to be foreclosed. The defendant derived title through this foreclosure. It was held, as against the heirs of the original purchaser, that the defendant was estopped to deny the validity of the commissioner's deed. So, in *Phelan v. Kelley*, 25 Wend. 389, it was held that where a person having a possessory title to lands dies in possession, leaving several children, his heirs at law, who succeed to such possession, it was not competent for one of such heirs, who had obtained the exclusive possession of the whole of the premises, to defeat a recovery by his co-heirs of their proportional parts or shares, by setting up a title acquired from the owners of the land; that to avail themselves of such title, they must first surrender possession to their co-heirs, and then bring ejectment. And in a number of cases it has been held that where one takes by descent as a co-heir or tenant in common he cannot show, in an action of ejectment by his co-heir, that his ancestor had no title. *Jackson v. Streeter*, 5 Cow. 529; *Proprietors of Braintree v. Battles*, 6 Vt. 395.

But the consequences of treating this case as an exception to the general rule are somewhat serious. If, as we hold, the defendant had the prior right to this land, it was under no obligation to treat with the plaintiff, or pay him for the disturbance of his possession, which was unlawful as against the company. Has it by this deed disqualified itself forever from asserting the right that it would have possessed had it not done this? We think not. Assuming, as some of the cases indicate, that before disputing the title of his grantor the grantee is bound to surrender his possession taken under the deed, such requirement is obviously inapplicable to a case like this, where the only possession consists in the disturbance of a water-right or ditch claimed by the plaintiff by the construction of the road across such a ditch. It could only be restored by the destruction of the road and the re-

building of the ditch; in other words, by the surrender of possession under the deed, and a repudiation of the entire transaction, when it is admitted that the defendant could set up its "prior title and proceed against" the plaintiff as a trespasser. But this would be a useless and expensive formality, and we think the rule that forbids a tenant from disputing his landlord's title without first surrendering his possession has no application to a case like this. It may be said in general that the doctrine of estoppel exists only where there is an obligation to restore the possession of the land upon certain contingencies; such, for instance, as exist between landlord and tenant, or mortgagor and mortgagee. In such cases the occupant is considered to have pledged his faith to return the possession of the land which he occupies, and will not be permitted to do anything to impair the title of him from whom he has received it. 3 Washb. Real Prop. 98; *Gardner v. Greene*, 5 R. I. 104; *Osterhout v. Shoemaker*, 3 Hill, 513.

In this case the defendant not only did not agree to surrender possession to the plaintiff, but it accepted the deed with this covenant or condition, for which it received no consideration, and we do not consider it a breach of good faith upon the part of the defendant to set up this fact; nor ought it to be put in a worse position by having accepted this deed, and paid \$250 therefor, than it would have occupied had it refused altogether to treat with the plaintiff. The deed was evidently delivered and received by these parties under a misapprehension of their legal rights, and it would be manifestly unjust to hold the defendant forever estopped from asserting the invalidity of the covenant into which it had inadvertently entered.

The judgment of the court below must be affirmed.

Forfeiture of Land Grant by Failure of Company to Complete Road.—See *Southern Pac. R. Co. v. Esquibel* (N. M.), 36 Am. & Eng. R. Cas. 410; *St. Louis, etc., R. Co. v. McGee* (U. S.), 26 *Id.* 525, note 531; *Bybee v. Oregon, etc., R. Co.* (C. C.), 24 *Id.* 127; *Neer v. Williams* (Kan.), 10 *Id.* 561; *Grinnell v. Chicago, etc., R. Co.* (U. S.), 5 *Id.* 447; *Van Wyck v. Knevals* (U. S.), 10 *Id.* 664.

Forfeiture of Grant—Effect of Confirmation of Title of Intervening Claimants.—Act Cong. March 2, 1889, declaring a forfeiture of certain lands theretofore granted to the state of Michigan, in aid of certain railroads, provides, in section 2, that "this act shall not be construed to prejudice any right of the Portage Lake Canal Co. * * * to apply hereafter to the courts or to congress for any relief, legal or equitable, to which they may now be entitled." *Held*, that this special provision for the claims of the canal company excludes it from the benefit of the general provisions of section 3, which confirms the titles of all persons to whom any of such lands have been disposed of under color of the public land laws, where the government retains the consideration. *Lake Superior Ship Canal R. & Iron Co. v. Cunningham*, 44 Fed. Rep. 587.

MINNEAPOLIS & ST. CROIX R. CO.

v.

DULUTH & WINIPEG R. CO., (DULUTH & IRON RANGE R. CO.,
Intervenor.)*(Minnesota Supreme Court, Dec. 17, 1890.)*

Grant of Swamp Lands—Forfeiture—Breach of Conditions.—The grant of swamp lands to the intervenor by Sp. Laws 1875, chap. 54, was a grant *in presenti* upon conditions subsequent. Such a grant is not forfeited by a mere breach of the conditions, but only by some affirmative action on part of the state after the breach, declaring or asserting the forfeiture on account of the breach.

Transfer of Grant in Case of Forfeiture—Reinvestment in State.—Sp. Laws 1878, chap. 246, transferring this grant to the defendant "in case of forfeiture by said Duluth & Iron Range Railroad Company" was a grant upon a condition precedent, to-wit, that the former grantee shall be divested of the grant, and the same become reinvested in the state, because of a breach of its conditions.

Same—Failure to Declare Forfeiture.—Hence, although the intervenor defaulted, yet, it never having been divested of the grant by any declaration or assertion of forfeiture by the state, the condition precedent to defendant's grant has never been performed or fulfilled, and consequently the grant has never taken effect.

"Float Grant"—Selection of Swamp Lands.—Sp. Laws 1869, chap. 56, although in form an amendment to Sp. Laws 1865, chap. 3, is in itself a complete act, making a "float" grant to the plaintiff in aid of its "Hinckley" branch of 10 sections to the mile without any limitation as to the locality where the lands shall be selected. But the right of selection not being given to the plaintiff belongs to the state, which may fill the grant out of any of its swamp lands. Notwithstanding the grant to plaintiff the state had a right to grant any of its swamp lands to any one else, provided only that it retained enough to fill plaintiff's grant.

Same.—The grant to intervenor is also a float grant, but the right of selection is given to the grantee, but limited to the three counties of St. Louis, Cook, and Lake.

Insufficiency of Lands—Priorities—Construction of Grants.—The provision in this grant "that no lands shall accrue to the said company under this act, until all grants of swamp lands previously made shall be fully satisfied," was not intended to postpone the appropriation of any land to intervenor's grant, until all prior grants had been actually filled by the selection of specific lands to their full amounts, but merely to provide that in case there were not enough lands to fill all the grants, including intervenor's, the prior grantees should have their full amounts, and intervenor stand the shortage.

Same—Authority of State.—There not being enough swamp lands in the three counties named to fill intervenor's grant, and there being enough outside these counties to fill plaintiff's grant, the state had no right to appropriate to the latter lands in these counties, at least after intervenor's grant had, by selection, attached specifically to such lands.

APPEAL from District Court, St. Louis County.

M. D. Grover and *Geo. B. Young*, for Minneapolis & St. C. R. Co.

Warner & Lawrence and *Barr & Catlin*, for Duluth & W. R. Co.

Draper & Davis, *Davis*, *Kellogg & Severance*, and *Horace G. Stone*, Special Counsel, and *J. H. Chandler*, General Counsel, for Duluth & I. R. R. Co.

MITCHELL, J.—This is a contest between three rival claimants to a 40-acre tract of swamp land, situated in St. Louis county, and within the Duluth land district, each holding a deed from the governor of the state, and each claiming title under a legislative grant of swamp lands in aid of its road. The land is more than 10 miles from intervenor's road. No part of plaintiff's road is within St. Louis county, or within the Duluth land district. Intervenor's road is wholly within the counties of St. Louis and Lake. The dates (all in 1889) of selections by, and conveyance to, the respective parties are as follows: January 8th, deed to defendant; January 14th, selection by intervenor; May 2d, selection by plaintiff; June 1st, deed to plaintiff; December 20th, deed to intervenor. The plaintiff claims under the act of March 5, 1869, (Sp. Laws 1869, chap. 56,) amending the act of February 11, 1865, (Sp. Laws 1865, chap. 3.) The intervenor claims under the act of March 9, 1875, (Sp. Laws 1875, chap. 54,) which was amended by the acts of February 17, 1876, (Sp. Laws 1876, chap. 241;) March 6, 1883, (Sp. Laws 1883, chap. 69;) and of March 10, 1885, (Sp. Laws 1885, chap. 87.) The defendant claims under this same act of March 9, 1875, (Sp. Laws 1875, chap. 54,) and the act of March 9, 1878, (Sp. Laws 1878, chap. 246.) All issues of fact are determined by the findings, so that the case turns upon questions of law arising on these various legislative acts.

1. Defendant's contention is that the grant to the intervenor, by the act of March 9, 1875, was transferred to itself by the act of March 9, 1878. The act of 1878 is entitled "An act to transfer the lands granted to the Duluth & Iron Range Railroad Company, and for other purposes." It provides that the lands granted to the Duluth & Iron Range Railroad Company, by the act of March 9, 1875, in case of forfeiture by the said Iron Range Railroad Company, be and the same are hereby transferred and vested in the Duluth & Winnepeg Railroad Company." This is clearly a grant upon a condition precedent, to-wit, the forfeiture of the grant by the former grantee. By reference to the act of March 9, 1875, it will be seen that the grant to the intervenor is what

Transfer of
lands for-
feited for
breach of
conditions.

is familiarly known as a grant "*in presenti* upon conditions subsequent." It is elementary law that such a grant is not forfeited by mere default of the grantee in the conditions, but only by some affirmative act of the state, after the breach or default, declaring or asserting the forfeiture. The right of the state to a forfeiture must be asserted by judicial proceedings, the equivalent of an inquest of office at common law, finding the fact of forfeiture, and adjudging a restoration of the estate on that ground; or there must be some legislative assertion of ownership of the property for the breach of the condition; and until this is done the grant remains vested in the grantee, notwithstanding the breach of the condition. Moreover, if, after the breach, the grantee proceeds and earns the grant by the construction of its road, before any action on part of the state asserting or declaring a forfeiture, the state cannot afterwards divest the grantee of the land by declaring a forfeiture. These propositions, as applied to land grants, have become so familiar, especially since the decision in *Schulenberg v. Harriman*, 21 Wall. 44, that a discussion of them, or a citation of authorities in their support, would be worse than useless. The intervenor was not in default in any of the conditions of its grant in March, 1878, or for nearly a year afterwards. In 1879, it did default, not having, as the court finds, located its line, or filed a map of it, until the spring of 1882. But the state has never declared or asserted any forfeiture, either by legislative act or by judicial proceedings, and in the meantime the intervenor has gone on and earned its grant by the construction of its road, so that it is now beyond the power of the state to declare a forfeiture. It is not, and cannot be, claimed that the act of 1878 amounted to a legislative declaration of forfeiture, because at the time of its passage, there had been no default or breach on part of the intervenor. It follows that the grant of 1875 has never been forfeited, but is still vested in the intervenor. It would seem to necessarily follow, as a corollary from this, that the condition precedent to the grant to defendant has never been performed or fulfilled, and hence that the grant has never taken effect. But defendant contends that the word "forfeiture" is used in the act of 1878 merely in the sense of a default or breach of condition which would be a ground for a forfeiture; in other words, rendered the grant subject to forfeiture, and hence on the mere default of intervenor the grant to itself took effect. The word "forfeiture" is, no doubt, frequently used in the sense suggested, but it could not have been used in any such sense here. Clearly the legislature never intended that there should be two vested co-existent grants,—one in the inter-

venor, and another in the defendant,—which would be the case here, if defendant's contention is correct. It cannot be seriously claimed that the act made a new grant, distinct from and independent of the one previously made to the intervenor. Counsel conceded on the argument that, if there had been no forfeiture by intervenor, the grant to the defendant would not have taken effect. Indeed this concession was unavoidable, for, if the act of 1878 made a new and independent grant, no such subject is expressed in the title. What the legislature intended, and all they intended, was that, if the intervenor should be divested of its grant because of a breach of its conditions, then it should go to the defendant. The language of the act must be construed with reference to the rule of law that the grant would not revert to the state, so as to be capable of being transferred by it to another, without a declaration or assertion of the right of forfeiture on part of the state. Counsel suggests that, under this view, the grant to defendant would amount to very little, being in effect a grant at the option of the state to declare a forfeiture, if it saw fit. This may be true. But the answer is that this is all the defendant got from the state, and the courts cannot enlarge it into something greater. Counsel also urges that the case is different from what it would have been if intervenor's grant had, at the date of the passage of the act of 1878, acquired precision, and had attached to specific lands, instead of being, as it then was a mere float. But we cannot see how this has the slightest bearing upon the case. Our conclusion is that, the condition precedent never having been performed, the grant to defendant never took effect; hence the deed to it is absolutely void, having no legislative grant to rest on.

2. This brings us to the consideration of the respective claims of the plaintiff and the intervenor. Each concedes that the other has a valid grant, and has complied with its terms. It becomes necessary, therefore, to ascertain the extent and nature of these two grants. It will be observed that the first grant to plaintiff was by the act of February 11, 1865, and that the act of March 5, 1869, under which it now claims, is in the form of an amendment to, or substitute for, section 1 of the act of 1865. And the first question to be determined

Effect of act
of 1869.

is whether the provisions of sections 3 and 4 of the act of 1865 are, as intervenor claims, applicable to the act of 1869; for, if they are, then plaintiff has no right to any land in St. Louis county, or in the Duluth land district. Our opinion is that the act of 1869, although in form an amendment to section 1 of the act of 1865, is, in itself, a complete act, fully covering the subject to which it relates,—

the grant to what we may call the "Hinckley Branch,"—and that it expresses and contains every condition and limitation to which that grant is subject; and hence that the provisions of sections 3 and 4 of the act of 1865 are not applicable to it. It would require the analysis and entire comparison of the two acts to explain fully all the considerations which have led us to this conclusion, but we will only suggest a few of them. The act of 1865, it will be observed, contains two grants,—that in 1 to the Hinckley branch, and that in section 2 to what may be called the "Mankato Branch." The act of 1869 applies only to the first grant, the second being left unchanged. Now, in section 1 of the act of 1865, which is really the granting part of the act, the grant is limited to odd-numbered sections, and to lands lying in the counties through which the road may run. These are all omitted in the act of 1869. In the act of 1865, the grant to the Hinckley branch in section 1, like that to the Mankato branch in section 2, is made "upon the terms and conditions hereinafter specified;" *i. e.*, in sections 3 and 4. In the act of 1869, this is conspicuously absent. Again, the act of 1869 contains a proviso expressly postponing the grant to prior ones, similar to one found in section 4 of the act of 1865, a wholly useless repetition, if the provisions of section 4 were intended to remain applicable to the later act. Further, if the other provisions of sections 3 and 4 are to be imported into the act of 1869, there is no reason why the restriction of the grant to odd-numbered sections should not also apply. This would seem manifestly contrary to the plain purpose and intent of the act. Again, under sections 3 and 4 plaintiff could only go outside the counties through which its road runs, in case four sections to the mile could not be gotten in those counties. The result would be that if four sections, and only four, were obtained in these counties, then, if the provisions of sections 3 and 4 are applicable, the plaintiff could not go outside to obtain the other 6, and thus the grant of 10 sections to the mile would be defeated. It is suggested that the provisions of sections 3 and 4 may be considered as amended by the act of 1869, so as to conform to its provisions, and, as thus amended, be still applicable. But these sections must be retained in their original condition, because they are still applicable to section 2,—the grant to the Mankato branch. Hence, if the suggestion referred to be adopted, it would result in the anomalous situation of having sections 3 and 4 at one and the same time in an amended form, as applied to the act of 1869, and also in their original form, as applied to section 2 of the act of 1865. The continued existence of section 2, and the consequent need of preserving sections 3 and 4, may ex-

plain why they were not expressly repealed by the act of 1869. Our conclusion is that the provisions of the sections are not applicable to the act of 1869; that that act is a grant of 10 sections to the mile out of any swamp lands then belonging to, or that might thereafter belong to, the state, without any limitations or restrictions as to sections or locality. Such a grant, being one of a certain quantity out of a larger quantity of land, is what is termed in land-grant law a "float." It will be observed that the act is silent as to who shall make the selection of the land. There are two rules of law applicable to such a grant that have an important bearing on the result in this case. The first is that the right of selecting the lands to fill the grant, not being given to the grantee, belongs to the state. It can, so long as the plaintiff's rights are concerned, fill the grant out of any swamp lands in the state. The second is that such a grant does not tie up all the swamp lands in the state until the grant is actually filled. Notwithstanding the grant to plaintiff, the state could still dispose of any of its swamp lands, and give perfect title to them, provided only that it retained enough to fill plaintiff's grant. *U. S. v. McLaughlin*, 127 U. S. 428.

We turn now to the grant to intervenor. It does not claim anything (and it is not necessary that it should) under the act of March 10, 1885, which was enacted after the adoption of the constitutional amendment of 1881, relating to the disposition of swamp lands. It rests its claim wholly on the original grant of 1875. This was a present grant of 10 sections to the mile, "to be selected within 10 miles on each side of the road," and, if there should not be enough swamp lands unsold and unappropriated within each 10-mile section of the road, as completed, then the intervenor had "the privilege of locating the deficiency on any of the swamp lands belonging to or to accrue to the state, not otherwise previously disposed of, within the counties of St. Louis, Lake, and Cook, and no other counties in the state." Properly speaking, there is no such thing in this grant as "place lands" and "indemnity lands," as is the case in most congressional land grants. In all cases, whether the land selected be within or without the "ten-mile limit," it is the selection and not the location of the road by which the grant attaches to specific lands. In the first instance, the selections are to be limited to a certain district, and, if the lands in this district are all exhausted before the grant is filled, then the remaining selections may be made out of a larger district; but, wherever selected, all the lands are of the same class precisely as in the case of plaintiff's grant. Both grants are floats, the only differences between them being that in the one the

Grant to Intervenor considered.

right of selection is given to the grantee, while in the other it belongs to the grantor, and in the one the selections may be made anywhere in the state, while in the other they are to be limited, in any event, to three counties. The court finds that the intervenor has selected all the swamp lands within 10 miles of its road, and that there are not enough swamp lands belonging to the state, including the tract in suit, in the counties of St. Louis, Cook, and Lake, to fill its grant. It also finds that there are, and always have been, since plaintiff completed its road, more than enough swamp lands to fill its grant, belonging to the state, within the counties through which its road runs; and *a fortiori* there must be more than enough in the state outside the counties of St. Louis, Cook, and Lake.

The application of the principles already announced to this state of facts, makes the decision of the case very simple. The state, notwithstanding its prior grant to plaintiff, had a right, if it chose, to grant to intervenor all its swamp lands in the three counties named, inasmuch as it had enough left elsewhere to fill plaintiff's grant. This is, in effect, what the state did do by making this float grant to an amount as great or greater than all the swamp lands it owned in those counties. On the one hand plaintiff would have had the right, in case there had not been enough swamp land elsewhere to fill its grant, to insist that intervenor should not appropriate to its grant all the lands in these three counties, to the diminution of plaintiff's prior grant; and on the other hand intervenor has a right to insist that the state shall not, to the diminution of its grant, appropriate to plaintiff's grant swamp lands in these three counties, inasmuch as there are enough elsewhere to fill it. The adjustment of the two grants, and the marshaling of the lands between the two grantees according to these principles, would fully protect the legal rights of both parties, and carry into effect both grants, as far as it is possible to do so. Whether the state would have had the power to convey the tract in suit to plaintiff had intervenor not previously selected it, is a question not necessary to be decided in this case. It would, under the circumstances, have certainly been inequitable to have done so. But it is very clear that it could not do so, under the facts of this case, after intervenor's grant had attached to this specific land by selection. Plaintiff's counsel, however, lay much stress upon the fact that the act, under which intervenor claims, provides "that no lands shall accrue to the said company under this act until all grants of swamp lands previously made shall be fully satisfied." It is contended that this postpones the appropriation of any lands to this grant until all prior grants

have been actually filled by the selection of specific lands to their full amount. If this was so, intervenor could not get an acre until plaintiff's grant is finally adjusted and filled, although this might occupy years, and notwithstanding that during all this time it is absolutely certain that there is more than land enough to fill both grants. We do not think that a result so unreasonable, as well as unnecessary, was ever intended. We think that all the statute means is that, if there is not enough swamp land to satisfy all prior grants and this one too, the prior grantees shall have their full amounts, and the intervenor must stand the shortage. Judgment affirmed.

Grant of Swamp Lands in Aid of Railroads.—See *Mills Co. v. Burlington & M. R. R. Co.* (U. S.), 10 Am. & Eng. R. Cas. 693; note 12 *Id.* 282; *Buena Vista Co. v. Iowa Falls, etc., R. Co.* (U. S.), 22 *Id.* 178. *Rice v. Sioux City, etc., R. Co.*, 14 *Id.* 549, note 553.

In an action by an individual to quiet title to land which he claims under the swamp land grant act of congress of September 28, 1850, and defendant claims under a railroad aid grant of May 15, 1856, the fact that the land was never selected by the state, as required by the swamp land act, is not conclusive that it was not swamp land, but its actual character may be shown. Where the land was swamp within the meaning of the act, the title thereto vested in the state on the passage of the act, and was not forfeited, as against the subsequent railroad aid grant, by failure to make selection as required in the act. Payment of taxes on the land by the railroad company and its grantee during the time the land was owned by the county under a grant from the state of all swamp land does not affect the rights of the county's grantee, as the land was exempt from taxation while owned by the county. Such grantee will not be required to refund such taxes, as he would not have been obliged to pay them. *Hays v. McCormack* (Iowa, May 28, 1891), 49 N. W. Rep. 69.

In order to show title in the state to particular tracts of "swamp and overflowed lands," under the act of congress of September 28, 1850, it is necessary to show that such tracts were ascertained and located as swamp or overflowed lands by commissioners to investigate this fact, and that their report to the secretary of the interior was approved by him. *Dowd v. Louisville, N. O. & T. R. Co.* (Miss. Dec. 1, 1890), 8 So. Rep. 295.

MOWER

v.

KEMP.

(*Louisiana Supreme Court, Oct. Term, 1890.*)

Evidence—Private Law—Judicial Notice.—While it is true that a legislative act authorizing a private corporation to execute a mortgage on lands and franchises which have been donated to it by the state, being a private act, should be introduced in evidence, yet that it has not can make no difference when such act has been, in another cause, recognized and enforced by a decree of this court. We are bound to take judicial cognizance of our own decisions.

Land Grant—Forfeiture by Legislature of State—Non-fulfillment of Condition.—In case the federal government neither by legislative enactment nor judicial construction has declared the forfeiture of a grant of lands to a railroad corporation, the legislature of the state, which is designated as the trustee in the granting act of congress, can, if she has done no act to estop her from setting up an adverse claim to a present grantee, forfeit such grant, on the ground of the non-fulfillment of the condition subsequent to said grant,—the completion of the railroad within the fixed period of 10 years.

Railroad Mortgage—Estoppel of State to Impeach.—The state, having by legislative enactment authorized a railroad corporation as donee and grantee of lands and franchises which she bestowed upon it to execute a mortgage thereon, is estopped from impeaching same. Rights acquired through the enforcement judicially of such mortgage cannot be destroyed by subsequent legislative action by the state.

Title of Corporation to Lands and Franchises—Power of State to Dispute Validity.—The corporation acquires an apparent legal title to the lands and franchises which are adjudicated to it under such judicial foreclosure of a mortgage, and the state, as trustee, is estopped from disputing its validity, or setting up adverse right or title in herself. Only the United States government, as grantor, can in such case take advantage of the grantee's non-performance of the condition subsequent which is attached to the grant; and this must be done by act of congress or judicial proceedings and decree.

Fulfillment of Land Grant Conditions "Out of Time."—So long as a railroad company is permitted to retain the occupancy of such granted lands, and to exercise the franchises it has thus acquired, and the grantor shall forbear to forfeit the grant, the corporation is entitled to proceed with the construction of its railroad to completion "out of time," and thus fulfill the condition subsequent that is attached to the grant.

Effect on Grant of State Legislation—Rights of Party in Possession.—At most, an intervening, repealing statute, enacted by a legislature of the state, as trustee, could repeal and avoid its own donation to the railroad company; but it, containing only like conditions as those prescribed in the granting act of congress, left the grant as it was originally, and, it having never been revoked by act of congress or judicial decree, a mere possessor of the granted lands, without title from any source, can take nothing by the effect of the repealing statute, the condition subsequent having been intermediately fulfilled.

Right of Trespasser to Recover Value of Improvements.—The granted lands having been withdrawn from sale and settlement, and passed into the domain of private property, not subject to entry under the United States government homestead laws, defendant, not having a title from any source whatever, must be treated as a trespasser, and not entitled to recover the value of improvements in excess of the annual revenues of the land.

APPEAL from District Court, Parish of Bienville.

Stubbs & Russell, Wise & Herndon, and W. U. Richardson, for appellant.

Patterson & Dorman, for appellee.

WATKINS, J.—This is a petitory action for the recovery of a small tract of land situated in the vicinity of the route of the Vicksburg, Shreveport & Pacific Railroad Company, with its rents and revenues; and the plaintiff

Case stated.

46 A. & E. R. Cas—31

also claims damages for the destruction of timber. Defendant is sued as a naked trespasser without color of title or right in the property. To this suit the defendant first filed an exception of no cause of action, which having been referred to the merits, he filed an answer, in which he averred that he was in possession of the property; that plaintiff was without any legal or valid title to said land, and had no such interest therein as to entitle him to sue for its recovery. He further averred that he is entitled to the benefit of the homestead laws of the United States government, and, believing that this land had reverted to the government, or that the title thereto was in the state of Louisiana, and therefore would so revert, as the railroad had not been completed within the time required by the granting act of congress, he made a settlement, and located on this land with the *bona fide* intention of acquiring a home for himself and family, and of entering same under the homestead law, as soon as it was declared subject to entry; or, if said land should be confirmed to said railroad company, that he would purchase same from it; and that he had repeatedly offered to buy it from said company, if it could make him a clear warranty title; but it could not do so. He makes claim for \$1,200 as the value of his improvements in case of eviction, and pleads the prescription of one year against plaintiff's demands for revenues and value of timber destroyed. The cause was tried by a jury of the vicinage, and from an adverse verdict and judgment plaintiff has appealed.

The history of plaintiff's title is as follows, viz.: In 1887 plaintiff acquired title from the Vicksburg, Shreveport & Pacific Railroad Company; and it acquired by purchase at master's sale made on the 1st of December, 1879, in the foreclosure of a mortgage which was executed on the 1st of September, 1857, by the Vicksburg, Shreveport & Texas Railroad Company, whose right, title, interest, and franchises the said Vicksburg, Shreveport & Pacific Railroad Company had in the meanwhile acquired. This mortgage of the said lands, appurtenances, and franchises of the Vicksburg, Shreveport & Texas Railroad Company was specially authorized by an act of the legislature of date March 19, 1857. There had been another act of the legislature passed on the 11th of March, 1857, formally accepting the benefits of the act of congress of date June 3, 1856, donating certain lands to the state of Louisiana for the purpose of aiding in the construction of a railroad from the Texas state line to the Mississippi river at a point opposite Vicksburg, in the state of Mississippi, and upon the same terms disposed of same to the said railroad company. On

History of
plaintiff's
title.

defendant's answer, and this chain of title thus traced back to the United States government, his contentions are as follows, viz.: That there is no evidence in this record of any special authorization by the state to the Vicksburg, Shreveport & Texas Railroad Company to execute a mortgage on the granted lands; no evidence to show that the railroad company ever issued any bonds for the security of which said act of mortgage was executed; that, if granted, said mortgage was absolutely null and void, because, under the granting act of congress, the state was only authorized to sell lands opposite each 20 miles of completed road, but she was powerless to grant any right or make any disposition whatever of other lands until the road had been completed for another 20 miles, and so on, to the end of the route; and that the completion of said road, as aforesaid, was made by said act a condition precedent to any disposition thereof by the state. Then, as there has been no act of the state since the completion of the road opposite the land in controversy, divesting herself of the legal title to same, it must be in the state, subject to be reclaimed by the government of the United States, and disposed of as it may deem best, as the terms of the grant are that, if said road is not completed within 10 years, no further sales shall be made, and the land unsold shall revert to the United States. He further contends that the grant of the state in 1857 to the railroad company, the act authorizing the mortgage, if any, the act of mortgage itself, and the sale to the railroad company, were subjected to the condition precedent that the state had the right to declare the grant forfeited if the road was not completed within 10 years, thereby destroying all intermediate rights that the company had acquired thereunder. That all parties contracting with the company were bound to know that this condition was thus imposed, and they must have been aware that their acquisition of it was *cum onere*. That in 1879 an act of the legislature was passed, repealing the act of 1857, disposing of these lands to the railroad company. That the master's sale of the property was not made for some months thereafter; and that the railroad company had full knowledge of such reservation when it became the adjudicatee thereof.

At our last term of court we had under consideration and decided the case entitled Vicksburg, S. & P. R. Co. *v.* Sledge, 41 La. Ann. 896, which was a case quite similar to the instant one, and in which we rendered an opinion adverse to the claims and pretensions of the defendant, who was a settler upon these railroad lands, like this defendant, claiming to be a *bona fide* possessor, with an intention to acquire a title from the United

Other decisions as to rights of settlers.

States government under its homestead laws. In that case we held, on a careful consideration of the issues involved, that the state did by a special act of the legislature of date March 19, 1857, grant to the Vicksburg, Shreveport & Texas Railroad Company "the full and perfect right to mortgage and hypothecate all or any part of the lands granted by the United States to the state of Louisiana to aid in the construction of said railroad, by virtue of an act of congress making a grant of lands to the state of Louisiana to aid in the construction of railroads in said state, approved June 3, 1856." *Vicksburg, S. & P. R. Co. v. Sledge*, 41 La. Ann. 900. Thereunder we found that a large quantity of bonds were issued by the company, for the security of which a mortgage was regularly executed. We found that on due proceedings had, the validity of this mortgage was recognized by the supreme and circuit courts of the United States, and that all the lands and franchises acquired by said company under that grant and under the assignment of the state were purchased by the Vicksburg, Shreveport & Pacific Railroad Company at a judicial sale made under and in pursuance of decrees of the circuit court, and that it went into possession thereunder. While it may be true, as a general proposition, that the act of the legislature authorizing the execution of this act of mortgage, being a private act, should have been introduced in evidence, yet that it was not can make no difference, as we are bound to take judicial cognizance of our own decisions; and by the terms of the decision just quoted we are informed that the mortgage was duly authorized and executed.

With regard to the right of the legislature to authorize the company to execute such a mortgage whereby the title might be irrevocably divested before the conditions of the grant were fulfilled, a sufficient answer is found in our opinion in the *Sledge Case*; for, in that case, we held that the state made the disposition of the lands granted to the railroad company on precisely similar circumstances to those under which congress made the grant to her; and we held that "the act of June 3, 1856, by the congress of the United States, passed a present interest in the lands to the state of Louisiana, which became certain by identity when the sections were located and maps were filed with the secretary of the interior." We also found that the state conveyed these sections to the railroad company in 1857, and that "it was a condition precedent to the conveyance of any of the sections that the road should be first constructed in sections of twenty consecutive miles each before the road could get title to any

Right of legislature to authorize mortgage divesting title.

portion of the land coterminous with its constructed line." We found that "the road had completed [only] a portion of its line," and that the "portion between Shreveport and Monroe [Louisiana] was not constructed within the ten years." We held that "the federal government neither by legislative act nor judicial construction, has declared the forfeiture of the grant, and, under well-recognized jurisprudence of the federal courts; the legislature of the state of Louisiana,—if the state had done no act to estop her from setting up an adverse claim to the present grant to the plaintiff—could forfeit the grant to the railroad on the ground of the non-fulfillment of the condition subsequent to said grant,—the completion of the road within the fixed limit of ten years." We held that "the United States government could have complained of the manner of the execution of the trust by the state, but it has made no objection to the interpretation placed upon the act donating the lands by the state of Louisiana to the Vicksburg, Shreveport and Texas Railroad Company;" that "the present plaintiff [the railroad company] acquired title through the decree of the United States supreme court, which recognized the validity of said mortgage, and ordered all the property included therein to be sold to satisfy the same;" that "the state, having authorized this act of mortgage, under and by virtue of which said parties acquired rights, is estopped from impeaching the same, and declaring it a nullity. Rights thus acquired cannot be destroyed by subsequent legislation." *Vicksburg, S. & P. R. Co. v. Sledge*, 41 La. Ann. 902, 903. On this hypothesis we held in that case that "the plaintiff has an apparent legal title to the land by virtue of the sale to satisfy a mortgage specially authorized by the state of Louisiana. By the act of the general assembly authorizing said mortgage, the state is estopped from disputing the title, and setting up title in herself, the original grantor, [of the railroad company,] and the United States government can only take advantage of the non-performance of the condition subsequent attached to the grant. This may be done by legislative act or judicial construction. The government of the United States has made no assertion of the forfeiture, and the legal title to said land will remain in the plaintiff until there is some assertion of ownership on the part of the federal government for the breach of the condition, by directing the possession and appropriation of the land, or that it be offered for sale or for settlement.

In reference to this question, upon deliberate reflection, our minds remain fixed and unaltered. Defendant's counsel cite us, with great reliance, to the opinion of the supreme court

in *Schulenberg v. Harriman*, 21 Wall. 44, and *Farnsworth v. Minnesota & Pac. R. Co.*, 92 U. S. 49, as announcing a different doctrine. But our reading of the former serves only to confirm our previously expressed opinion, for in the opinion we find the following, viz.: "The provisions in the act of congress of 1856, that all lands remaining unsold after ten years shall revert to the United States, if the road be not then completed, is no more than a provision that the grant shall be void if a condition subsequent is not performed. * * *

And it is settled law that no one can take advantage of the non-performance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor if the grant proceed from an artificial person; and if they do not see fit to assert their right to enforce a forfeiture on that ground the title remains unimpaired in the grantee. * * *

And the same doctrine obtains when the grant, upon condition, proceeds from the government. No individual can assail the title it has conveyed on the ground that the grantor has failed to perform the conditions annexed." This opinion was rendered in 1874, and that in the *Farnsworth Case* in 1875; Mr. Justice FIELD being the organ of the court in each case. To show the distinguishing characteristics of the latter case from those of the instant case we will make the following pertinent extract, viz.: "The parcels thus earned were excepted from forfeiture. It was certainly competent for any company to subject its property, rights, and franchises conferred, or attempted to be conferred, by the act of May 22, 1857, or derived from any other source, to this liability. Its assent, in this respect, was one of the conditions upon which it received the loan of the state credit provided by the constitutional amendment. When the assent was given, the relation of the state to the land and connected franchises was precisely *as though a condition had been originally incorporated in the grant*. [Italics are ours.] The mortgage or deed of trust not having been executed until after the amendment was accepted, and the holding of the lands of the company, with its rights, privileges, and franchises, having been thus made dependent upon the completion of

Fulfillment of conditions.
Construction
"out of time."

the road within the periods prescribed, the beneficiaries under that instrument took whatever security it afforded, in subordination to the rights of the state to enforce the forfeiture provided."

In that case it is manifest that a state constitutional amendment supervened, whereby additional conditions were imposed upon the grant than those which were originally stipulated in the granting act of congress:

and hence the difference in the opinion from ours in the Sledge Case—the granting act of the state in 1857 being identical with that of congress. But in the Sledge Case we found that the road “was not completed within the ten years prescribed by the act of congress, but was completed and finished ‘out of time,’ in July, 1884, when the governor certified to the secretary of the interior of its entire construction between the termini and along the line proposed in the act of congress donating the land for the construction of said road.” *Vicksburg, S. & Pac. R. Co. v. Sledge*, 41 La. Ann. 900. In this manner the condition subsequent was fulfilled. The company certainly had the right to construct the road “out of time,” as no intervening effort to forfeit the land had been made by act of congress or judicial proceedings. *United States v. Memphis*, 97 U. S. 291; *Hannibal & St. Joseph R. Co. v. Smith*, 9 Wall. 96; *Merrick’s Ex’r v. Giddings*, 115 U. S. 307; *Van Wyck v. Knevals*, 106 U. S. 361, 10 Am. and Eng. R. Cas. 664; *St. Joseph & Denver City R. Co. v. Baldwin*, 103 U. S. 430, 2 Am. & Eng. R. Cas. 510. When lands thus granted have been listed at the instance of the grantee, and maps thereof are made and filed with the secretary of the interior, they are withdrawn from sale and entry, and are not thereafter subject to settlement or homestead by settlers. Lists of land thus certified to the state by the commissioner of the general land-office convey as complete titles as patents, and are not thereafter susceptible of pre-emption. *Rev. St. U. S. § 2449*; *Fraser v. O’Connor*, 115 U. S. 102; *Mower v. Fletcher*, 116 U. S. 381. Recognizing this principle, we said in *Sledge’s Case*: “The land in controversy was withdrawn from public sale and entry before the defendant went on the same.” His entry thereon was unlawful, and, as he sets up no title other than his trespass, he cannot dispute the apparent title of the plaintiff. *Stille v. Shull*, 41 La. Ann. 816. The defendant is exactly in *Sledge’s* situation. At most, the repealing act of 1879 had the effect of repealing the grant of the state to the railroad company of 1857, and of restraining her grant from the government of the United States. That grant having never been revoked by act of congress or judicial decree, it is impossible for the defendant to take anything thereby, because the condition subsequent has been fulfilled by the completion of the road, and the acceptance of the state as grantee, and the trust is at an end, and the title of the company completed, and rendered indefeasible. Under this state of facts the United States government could not, in our opinion, recover the lands by suit or forfeiture from the

Trespasser
cannot dis-
pute title.

Petition of
defendant.

company; and the defendant could not, by any length of possession, acquire a homestead upon it. Confessedly the defendant has no title, and does not occupy the position of a good faith possessor. True it is that our predecessors have held frequently, and correctly held, that actual settlers

Defendant is trespasser.

on the public domain, open to sale and pre-emption, cannot be considered as trespassers, even as against the government. *Kellar v. Belleandean*, 6 La. Ann. 643; *Price v. Curran*, 5 La. Ann. 686. Certainly not. But defendant's case is different. Plaintiff holds a proper title out of the government, and the lands were previously withdrawn from sale and homestead. They have passed into the domain of private property *quoad* this controversy, and the homestead laws are at least held in suspense. Defendant is a trespasser, and not entitled to the value of the improvements; but we think it equitable and

Judgment reversed.

right that he should be relieved from the plaintiff's claim for rents and damage, considering one demand as the just equivalent of the other. The judgment must be reversed on the principles of law herein assigned as well as on those announced in *Vicksburg, S. & P. R. Co. v. Sledge*, which is unreservedly affirmed. It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed; and it is further ordered and adjudged that the plaintiff be, and he is hereby, decreed the owner of the property claimed in his petition, and all the improvements thereon; and that all the other demands of the plaintiff for rents and damages be extinguished and compensated by the defendant's reconventional demand: and that the defendant and appellee be taxed with all costs in both courts.

Forfeiture of Land Grants for Nonfulfilment of Conditions.—See *ante* *Bybee v. Oregon & Cal. R. Co.*, and note, pp. 460, 472.

CHICAGO, MILWAUKEE & ST. PAUL R. CO. *v.* DURANT *et al.*

SAME *v.* HOSPES.

SAME *v.* STAPLES.

SAME *v.* UNION DEPOT ST. RY. & T. CO.

(44 *Minnesota* 361.)

Contract for Right of Way—Specific Performance.—Certain of the defendants, in consideration of the extension of the plaintiff's railway to the city of Stillwater, entered into a contract with the plaintiff, in which they agreed that the city would furnish right of way through certain real es-

tate in the city, and that they would purchase one-half of a certain block of land, and grant the plaintiff a right of way through it. Such right of way was not so given or procured, and the contract remains unfulfilled on the part of the defendants; and several parcels of land included within the limits of the right of way, as designated, are shown to have been separately owned, subsequent to the contract, by some of the defendants, and to have been conveyed to other defendants with notice of the contract. In an action brought by plaintiff against the signers of the contract, and such grantees, for a specific performance, with compensation in damages, *held*, upon the facts stated in the complaint and set forth in the opinion, that the plaintiff is not entitled to the equitable interposition of the court for the relief sought, but must be left to its action at law for damages.

APPEAL from District Court, Washington County.

W. H. Norris, for appellant.

Fayette Marsh, for E. W. Durant and others.

J. N. & I. W. Castle, for E. L. Hospes and Isaac Staples.

Searles & Gail, for Union Depot St. Ry. & T. Co.

VANDEBURGH, J.—The demurrers to the complaint interposed in behalf of defendants Durant, Hospes, Hersey, Staples, the Union Depot Company, and O'Gorman, receiver, were sustained by the trial court, and the Case stated. complaint held sufficient as to the other defendants. From the order sustaining the demurrer the plaintiff appeals, and the principal question presented for our determination is whether the complaint states a cause of action in respect to the defendants above named. Generally, in equitable actions of this kind, the merits can be best determined upon proofs after answer; but we will examine and consider such questions as are fairly before us on this appeal.

1. If the action were brought solely against the defendants who executed the contract for the right of way, whom, for convenience, we will style "obligors," though equitable relief is demanded, a recovery might be had Nature of the action. for damages, and treating it as an action for damages, the defendants would, if they required it, be entitled to a jury trial. *Davison v. Associates of the Jersey Co.*, 71 N. Y. 334. But certain lots, through which the right of way was bargained for, are alleged to have been conveyed to certain other defendants, who are joined in the action, and who are not parties to the agreement, and against whom equitable relief, by way of specific performance, is sought. The two causes of action—one for damages and one for the special relief—cannot properly be united, and this is one ground of the demurrer. The action, then, must be treated as an equitable one for specific performance, with incidental relief, by way of compensation for such portion of the property in question as cannot be reached; and the sufficiency of the

complaint must be determined solely in respect to the right of the plaintiff to such relief.

2. It is charged in the complaint that in order to induce the plaintiff to construct a line of its railroad from a point on its River Division from Hastings to the city of Stillwater, the defendants Staples, Durant, Hospes, Hersey, and Sabin, with one Torinus, since deceased, on the 15th day of July, 1881, agreed in writing with this plaintiff that the city of Stillwater would and should give this plaintiff a right of way, 56 feet wide, through certain real property, as described in the complaint; and that on its part the plaintiff, in and by the same agreement, in consideration of the premises, undertook and agreed, among other things, that it would at once begin the construction of such branch line, and continue the same with all practical dispatch until the completion thereof; and that it did in all things well and truly fulfill and perform such agreement on its part. There is no doubt as to the sufficiency of the consideration to uphold the undertaking of the defendants, or that the parties are mutually bound, subject to the conditions of the contract. *Western Railroad Corp. v. Babcock*, 6 Metc. (Mass.), 346.

3. In respect to the defendants in whose favor the demurrer was sustained, it is not claimed that any of them now own or are interested in the property in question here, except the Union Depot Company, and O'Gorman, receiver. The last named are not parties to agreement, but are properly joined as having some interest in the property. But the decree of the court for specific performance of the contract could only be made operative against them, or any other persons than the original obligors, in so far as they have acquired from the latter portions of the right of way contracted for with notice. As to such lands, such parties would stand in their shoes, and be bound; but as to the lots acquired by the Union Depot Company of other parties, by purchase or condemnation, the contract is entirely nugatory, and in respect to the several tracts of land designated in the complaint as having been so acquired by the Union Depot Company, it could not be bound in this action. From the terms of the contract providing that the city would give a right of way, and the specification of the ownership of the several lots set forth in the complaint, it will not be implied that the defendants at any time owned or had title to any of them, save as therein set forth. From the complaint it appears that the Union Depot Company acquired title to the north 49 feet of lot 2, in block 28, from Helen M. Torinus and Louis E. Torinus, her husband.

Contract for
right of way—
Consider-
ation.

Defendants—
Parties hav-
ing interest
in property.

What the latter's interest was, does not appear. The defendant Sabin, one of the signers of the agreement in question, acquired, by purchase from Torinus, an undivided half of the south 35 feet, in width, of lot 7, and of the north 56 feet of lot 8, September 16, 1881. Sabin also purchased of defendant Durant and another, September, 1881, the north 15 feet in width of lot 7, and the undivided half of the south 35 feet in width thereof, and the undivided half of the north 56 feet in width of lot 8; and at the same time purchased of Torinus the other undivided half of south 35 feet of lot 7, and north 56 feet of lot 8. Sabin also purchased lot 5, and a portion of lots 5, 7, and 8, described in the complaint, was conveyed by him to the Union Depot Company, and is included in the right of way, 56 feet in width, described in the agreement. It is also alleged that the title in fee to the south 30 feet in width of lot 8 to lot 9, and the north 75 feet in width of lot 10, block 28, appear to be in the city of Stillwater, since 1875, as and for a part of Nelson street, and as part and parcel of the "Levee," so called. It further appears that the depot company have acquired divers other parcels of the same block from other persons, not parties to the contract, and have also granted to the plaintiff a certain portion of the lots 2, 3, 4, 5, 7, 8, 9, 10, 11, in block 28, lying within such 56 feet strip, or right of way. The defendant Sabin is the only one of the signers of the contract who appears to have title to any of the land in question, in block 28, and his interest is confined to that part of lots 5, 7, and 8, above described, and not already conveyed to the depot company. The only land in block 28, within the right of way, which, in case specific conveyance were decreed under the contract, would be subject to be so conveyed, is the land held by Sabin, and so much of the land of the depot company within the right of way not already conveyed to the plaintiff by it as it derived from Sabin, as above stated. As before intimated, land procured by the depot company from strangers to the contract would not be affected by it. As to block 27, the obligors, by the same contract, further agreed to purchase so much of block 27 as lay east of the alley, and to grant such right of way, as aforesaid, through the same to the plaintiff. As respects the lots in this half block, through which the right of way in question was in fact located, it appears that on September 15, 1881, the Union Depot Company, defendant, acquired title from Isaac Staples to one-half of lot 1, and lots 3, 4, and 5; and March 1, 1882, from defendant Hersey and others, to the other half of lot 1; and March 23, 1882, to lot 2, from Seymour, Sabin & Co., of which firm defendant Sabin was a member. It does not appear, however, what interest Hersey and Sabin had in the lots conveyed.

4. The city has not furnished the right of way, as agreed, and the defendants have not caused it to be done, or procured it themselves, through either block. The question now arises whether, upon the facts herein a case is made for the interposition of a court of equity so as to warrant a decree for specific performance as to the defendants Union Depot Company and Sabin, and to award a judgment for damages against other defendants, by way of compensation for the deficiency. The court will not undertake to compel the defendants, jointly or severally, to purchase the specific property, or to procure the right of way from the city. And it is not a case for compensation, because, conceding that the court might compel the depot company and Sabin to convey a partial interest representing a relative or proportionate share of individual obligors, as above described, the same would be relatively so small, as compared with the whole amount embraced in the contract, that the compensation or damages would apparently be the main object of the suit. In such cases a court of equity will not assess damages as compensation, but only where they are incidental to the principal ground of relief, and the court will leave the party to his action at law, unless he will consent to accept the part subject to conveyance without damages. *Earl of Durham v. Legard*, 34 Law J. Ch. 590. In some cases, however, where the vendor shows title to a portion only of the land contracted, or has wrongfully parted with part, justice may be done by an apportionment of the consideration, if the vendee consent to take part with an abatement of the price. 2 Lead. Cas. Eq. (4th Ed.), pt. 2, p. 1146. So, where the vendee knows at the time of entering into the contract (as may be implied in this case from the terms of the contract) that the vendor has title to a part only of the land, compensation will be denied. *Wat. Spec. Perf.* § 506; 5 Wait, Act. & Def. 781. This is not a case between vendor and vendee. By the contract the right of way was to be procured by or from others by gift or purchase. The plaintiff did not contract for a conveyance from the defendants. It did not rely upon the individual ownership of the obligors. The city was to give the right of way; and, as to block 27, the defendants were to purchase the entire half block jointly, and jointly bear the burden. It was not fairly within the contemplation of the parties that the interests which the individual obligors might have in some of the land embraced in the proposed right of way should be made subject to enforced conveyance under the contract, if unfulfilled in its scope and purpose by the obligors, who jointly entered into it. Equity, it is true, looks at the substance of

Case made for specific performance.

the contract, and, when the agreement can be substantially, though not literally, carried out, without changing the nature of the contract, or substituting a new one, and do justice between the parties, it will be so enforced. The doctrine of compensation rests upon this principle. And so where land is held as tenants in common by several persons, who have jointly agreed to convey the same, some of whom are not bound, or are deceased, those who are liable, or who survive, may be compelled, in a suit on the contract, to convey their individual or proportionate interests as tenants in common. *Hooker v. Pyncheon*, 8 Gray, 550. But such is not this case. The contract did not contemplate a conveyance of individual interests, but the acquisition of the right of way by the public, and by the joint act or purchase by the obligors; and, as to block 27, an essential condition and inducement to the parties was the purchase of the half block, and not the right of way merely. In any view of the case, and apart from the question of laches, considering the nature of the contract, the state of the title, the indefiniteness and uncertainty in the description set forth in the contract, we think that the parties should be left to their action at law, and the interposition of a court of equity is not warranted. Order affirmed.

Specific Performance of Agreement to Convey Right of Way.—See note 43 Am. & Eng. R. Cas. 645.

Unrecorded Deed Conveying Right of Way—Company in Possession of Part Only—Right of Bona Fide Purchaser.—A railroad company having a deed of a right of way which it did not record, took possession of a part only of the right of way conveyed. The land-owner subsequently conveyed the premises to a third party, and the deed given by him recited that the conveyance was subject to the railroad right of way. *Held*, that the purchaser had notice of the railroad company's title to that portion only of which it was in possession. *Cincinnati, I. & St. L. R. Co. v. Smith* (Ind. Sup. Ct. March 18, 1891), 26 N. E. Rep. 1009.

Land Covered by Location—Estoppel of Company to Claim Title.—In an action to try the title to a parcel of land occupied by a railroad company, it appeared that the defendant company after filing the location of its road, accepted a deed from plaintiff's predecessor describing the land conveyed as the land taken by the location, which description did not include the land in dispute; and at the date of the location defendant did not admit, nor did plaintiff's predecessor claim that the latter had title to the premises. A license to use the land in question was given by plaintiff's predecessor to defendant, which, of course, would have been useless had defendant owned the land. *Held*, that the defendant was not estopped to claim that the land in question was covered by the location. *Cunningham v. Boston & Albany R. Co.* (Mass. May 18, 1891), 27 N. E. Rep. 660.

Interest Acquired by Company in Right of Way where there has been Neither Conveyance nor Condemnation.—In *East Tenn. Va. & Ga. R. Co. v. Telford's Ex'rs* (Tenn. Oct. 30, 1890), 14 S. W. Rep. 776, it appeared that the charter of the defendant contained the following provision: "In the absence of any contract with the said company in relation to land through

which the said road may pass, signed by the owner thereof or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used only for the purpose of said road, and no longer unless the persons owning the said land at the time that part of the road which may be on said land when finished, or those claiming under him, her, or them, shall apply for an assessment for the value of said land, as hereinbefore directed, within five years next after that part of said road was finished. And in case the said owners, or those claiming under them, shall not apply for such assessment within five years next after the said part was finished, they shall be forever barred from recovering the said land, or having any assessment or compensation therefor," etc. *Held*, that where the company had occupied land for a right of way without any conveyance ever having been made, or a right of way condemned, the company acquired an easement only, and the land-owner was entitled to make any use of the right of way subject to the easement, not inconsistent with the company's use of the same.

Right of Railroad Company to Build Side-tracks on Right of Way—Interference with use by Land-owner.—Where by statute a railroad company acquires an easement 100 feet wide in the land over which its road is constructed, its right to build side-tracks is included in the original easement, and the building of a side-track within the 100 foot limit is no new taking of the land, although for thirty years prior thereto the land-owner had cultivated the right of way; such use by him is not adverse to the company's easement. *East Tenn., Va. & Ga. R. Co. v. Telford's Ex'rs* (Tenn. Oct. 30, 1890), 14 S. W. Rep. 776.

Parol Contract to Sell Land to Railroad—Statute of Frauds.—In *East Tenn., Va. & Ga. R. Co. v. Davis* (Ala. Nov. 15, 1890), 8 So. Rep. 349, it was held that a parol contract for the sale of land to a railroad company in consideration of the construction of a spur track to the mill of the grantor, is taken out of the statute of frauds by the actual construction of such spur track.

Release of Right of Way and Claims for Damages—Damages Caused by Overflow.—In *Updegrave v. Pennsylvania S. V. R. Co.*, 132 Pa. St. 540, it was held that an agreement between a land-owner and a railroad company to convey to the latter a right of way across the premises of the former, covers all damages, of whatever sort, suffered by the land-owner, for which he is legally entitled to recover compensation. Wherefore, a release to a railroad company, by a land-owner, of all claims for damages which may accrue by reason of the construction and maintenance of the railroad, is a bar to a recovery for injuries caused by a ditch and culvert constructed by the company upon its right of way subsequently to the original location and construction of the railroad.

SMITH

v.

HOLLOWAY.

(124 Indiana, 329.)

Conveyance of Right of Way—Easement—Right of Grantor to Use Streams.—A grant to a railroad company by a land-owner of a right of way is the grant of an easement only, subject to the right of the land-owner to make all lawful use of the land. Such a grant does not affect his right to use a stream of water flowing over the right of way.

Same—Parol Reservation of Water Right—Statute of Frauds.—A parol agreement reserving to the grantor the right to use a stream of water running across the land granted for a railroad right of way, is not void under the statute of frauds; the right remains in the grantor to the water irrespective of such agreement, and it, therefore, but confirms his existing right.

APPEAL from Pike County Circuit Court.

E. A. Ely and *J. W. Wilson*, for appellant.

F. B. Posey, for appellee.

ELLIOTT, J.—The appellee alleges in his complaint that in August, 1869, he was the owner of a tract of land; that prior to that date he granted a right of way for the construction of a railroad to the Evansville, Indianapolis & Cleveland Railroad Company; that the company constructed an embankment; that on the day named he conveyed to Granville Carlisle all of the tracts lying south and east of the right of way; that by a series of conveyances the defendant became the owner of the parcel conveyed to Carlisle; that on the 15th day of August, 1885, the appellee sold to the appellant a strip of land for a road 15 feet in width; that there is a spring from which a stream of water constantly flows; that this stream crosses the strip granted the appellant, and runs along the south line of the embankment, and into the inclosed land of the appellant; that on the 1st day of June, 1885, an agreement was made between the appellee and the appellant under which they erected a partition fence on the top of the embankment; that for more than 15 years before the agreement was entered into the appellee had used and enjoyed the stream; that it was agreed that the appellee's right to have the stream flow into his field should never be disturbed; that the partition fence should never be so changed as to interfere with the appellee's use of the stream; that he continued to use the stream, and the flow thereof was unin-

Case stated.

terrupted, until the 1st day of July, 1887, but on that day the appellant, against the protest of the appellee, so changed the fence as to shut off the field and pasture of the appellee from the stream; that the wrongful act of the appellant has caused the appellee to suffer damages in the sum of \$150. This complaint was challenged for the first time by a motion in arrest of judgment, so that the question for decision is as to the sufficiency of the complaint after verdict.

The point made by the plaintiff that the grant of the right of way to the railroad company precludes the appellee from maintaining this action is without substantial merit.

Owner's right to use water.

The owner of the fee remains the owner of springs, streams, minerals, and the like; for all that he grants is an easement. The owner cannot interfere with the free use of the right of way; but, subject to this use, he may make all lawful use of the land. The point made by the appellant that the parol agreement relied upon is in-

Statute of frauds.

valid under the statute of frauds is one of more difficulty; but, as the complaint shows that the strip granted the appellant was for the purpose of a road, we cannot say that the agreement reserving the water-right was not valid, for, upon the principle stated, the right to the water remained in the appellee as the owner of the fee. As the water-right remained in him, the parol agreement did no more than confirm in him an existing legal right. We cannot disturb the finding upon the evidence. Judgment affirmed.

Title Acquired by Railroad Company Under Conveyance of Right of Way.—

See *Robinson v. Missisquoi R. Co.* (Vt.) 30 Am. & Eng. R. Cas. 299, note 303; *Westchester & P. R. Co. v. Doddard* (Pa.) 33 *Id.* 195; *Frank v. Evansville & I. R. Co.* (Ind.), 30 *Id.* 224; *Chicago, etc. R. Co. v. Ward* (Ill.), 39 *Id.* 150; *Davis v. Memphis, etc. R. Co.* (Ala.) 39 *Id.* 65; *New Jersey, etc. Co. v. Morris Canal & Banking Co.* (N. J.) 36 *Id.* 515; *Atlantic, etc. R. Co. v. Lesueur* (Ariz.) 37 *Id.* 368; *Hargis v. Kansas City, etc. R. Co.* (Mo.) 43 *Id.* 599; *Vicksburg & M. R. Co. v. Barrett* (Miss.) 43 *Id.* 595, note 597.

DIFFENDAL

v.

VIRGINIA MIDLAND R. CO.

(86 *Virginia*, 459.)

Interference with Water Supply of Railroad Company—Equity Jurisdiction.

—Where there is an attempted unlawful interference with the water supply of a railroad depot, which will compel the company either to provide water at a heavy continual expense and inconvenience, or to allow its waterclosets to become nuisances, such irreparable damage is shown as gives equity jurisdiction to interfere by injunction.

Same—Grant of Right to Pipe Water—Rights of Subsequent Owner of Land.—Where a land-owner grants to a railroad company by a recorded deed the right to pipe water from a spring to its depot, and such land is subsequently granted to one having knowledge that the pipes are laid across it, and that the topography of the land requires them to be laid as they were, such subsequent grantee takes the land subject to the easement, and will be enjoined from interfering, although the tank to which the water is conveyed is located differently from the place named in the deed, such change, however, not affecting the position of the pipes. Evidence that the former owners of the land permitted the company to lay the pipes as they did, not as a part of the contract, but as a temporary convenience, will not warrant a re-hearing.

APPEAL from decrees of Corporation Court of Danville, in an action in equity by the Virginia Midland R. Co., complainant, against William Diffendal, defendant. An injunction was awarded complainant and was perpetuated, and defendant appeals from a judgment dismissing his petition for a re-hearing.

Rutherford & Page and *G. W. Crumpecker*, for appellant.

Kirkpatrick & Blackford, for appellee.

FAUNTLEROY, J.—This is an appeal from a decree of the corporation court of Danville, Va., entered at the July term of the said court, in a cause therein Case stated. pending in which the Virginia Midland Railway Company is complainant, and William Diffendal is defendant.

On the 11th day of September, 1874, J. K. Millner and J. M. Walker, who then owned and controlled the land, made an agreement, in writing, with the Washington City, Virginia Midland & Great Southern Railroad Company, of which the Virginia Midland Railway Company is successor, whereby in consideration of \$500, which was subsequently paid, the railroad company was granted the right to and use of the water from a certain spring upon the lands of the said Millner and Walker, and the right to lay down pipes to convey the water from the said spring to a water-tank to be constructed on the right of way of the said railroad. The said agreement was admitted to record in the clerk's office of the town of Danville, January 4, 1876. In pursuance of the said agreement, the said railroad company did lay down the pipes leading from the said spring to its right of way, not to a tank on the north side of the said roadway, but to a tank on the opposite side of the same. The said railroad company did not build the tank on the north side of their road, as specified in the said agreement, because the exact spot so specified was not eligible for the purpose; but its failure to do so was known to the said Walker and Millner, who made no objection, and who were also cognizant of the laying of the pipes,

which were laid, as laid, under their supervision and by their direction, and who, after the said pipes were so laid with their knowledge and consent, received the \$500 consideration stipulated therefor, and then ratified the manner of executing the contract in every particular; and never, to this day, have they, or either of them, raised the least objection to the action of the railroad company in the premises or interposed the slightest obstacle to its enjoyment of the water from the said spring and the easement appurtenant thereto. The said agreement was duly recorded, and the railroad company took possession and entered upon the open and notorious enjoyment and use of the said spring, and of the said pipes, without question, interference, or hindrance, till the 20th day of August, 1884, when the appellant, William Diffendal, who had purchased the said land in December, 1883, required the said railroad company to remove the said pipes, and, in default thereof, undertook to remove the same. On the 22d day of October, 1884, the appellee, the Virginia Midland Railroad Company, obtained from the corporation court of Danville, Va., an injunction restraining the appellant, William Diffendal, from interfering with the said pipes, and the enjoyment of the water from the said spring by the appellee, until the further order of the court. The appellant demurred to the bill, and answered the same, and took evidence in support thereof; but the court overruled the demurrer, and, at the July term, 1888, of the said court the injunction was made perpetual. From this decree this appeal is taken.

The first assignment of error is to the overruling of the demurrer, on the ground that the court of equity had not jurisdiction of the remedy. The court did not err in overruling the demurrer. On the 8th of September, 1884, the appellant, William Diffendal, who had become the owner of the land around and nearest the spring, after it had changed owners more than once during the nearly 10 years of the enjoyment by the railroad company of the easement or servitude of the water and the pipes, went to the said spring, and drove a wooden plug into the pipe, so as to cut off completely the supply of water to the depot of the railroad, which thereby suffered daily and hourly damage, by having its employes and passengers cut off from the supply of water, and having, at heavy daily outlay and inconvenience, to provide water for drinking purposes, and for their water-closets, or to have them closed up, or used without water, at the risk of becoming offensive, and a nuisance to public health and comfort,—an irreparable damage and public injury, for which the railroad company had no adequate remedy at law, sounding simply in damages,

**Jurisdiction
of equity.**

and an inconvenience, worry, loss, and risk to the appellee and to the public, which could not be estimated in damages, and which therefore called for a restraining order.

The second and third assignments of error go to the merits of the case upon the evidence. The court did not err in perpetuating the injunction. The pipe was laid many years before Diffendal purchased the land, and was so laid by the consent and under an agreement with the former owners, which was duly put on record. Diffendal purchased the land with full and actual knowledge that the pipe ran diagonally across the land in its route to the street, and that the topography of the land made it necessary that it should be located just where it was. Not only did he know, when he purchased, that the water was conveyed by the pipe diagonally across the land which he purchased, and that it was so by contract between his vendors and the railroad company, but the fact was open and visible that the water from the spring was conveyed by a pipe, the proper and necessary location of which was along the ravine where it was laid, and along the natural and fixed channel of the branch flowing from the spring. Diffendal bought the land with the full knowledge that a pipe carried the water from the spring to the railroad tank, and that, to do so, it must follow the ravine, just where it is, or do the impossible feat of running up hill. Knowing this, he took the land subject to the servitude which then, and for long years, had existed upon the land in favor of the railroad company, imposed upon it by his grantors; and, taking it subject to such servitude, he cannot now ignore the right of the railroad company so acquired and vested. The contract must be construed with reference to the topography and to what was done at the time by the parties in locating the pipe; and, in considering the relation of Diffendal as a vendee from Millner and Walker, to the servitude which his vendors had fixed upon the land by their contract with the railroad company, he will be presumed to have bought the land with reference to its condition at the time of the sale, subject to the easement or servitude in favor of the railroad company, of which he not only had constructive notice and admonition to inquire, by the recorded contract, but which he actually knew, could see, and did see, and well knew to exist. Washb. Easem. 26, says: "If, instead of a benefit conferred, a burden be imposed upon the portion sold, the purchaser, provided the marks of the burden be open and visible, takes the property with the servitudes upon it." On page 81 of the same book (2d Ed.), in discussing the case of *Pyer v. Carter*, 1 Hurl. & N. 922, where there was a drain

Complain-
ant's right to
injunction.

upon the premises conveyed which was not mentioned in the grant, but which was necessary to the enjoyment of the adjoining property, the author says the court held that the purchaser "must have known that the tenement claiming the drain must have some drainage, and he was therefore bound to examine and ascertain its existence; and that no actually 'apparent signs' were necessary to charge him with notice of the same."

In the case at bar, the grant by Millner and Walker to the railroad company was the use of the water from the spring, and the putting down a pipe to convey the water from the said spring to the water-tank. These pipes, or pipe, was to be laid along the new wagon road then being constructed by the grantors Millner and Walker, which said new wagon road the appellant assumes or asserts to be the present Main street of North Danville, which was not then laid off, or even contemplated, so far as the record shows, but, as the spring is a considerable distance (80 feet) from the "New Road," or present Main street, the pipe had to be laid over the land somewhere, to reach the said Main street; and this indefinite location over the land to reach the Main street, not fixed by the contract, was settled by the topography, and made definite and fixed by the consent and concurring action of the parties at the time in locating the pipe where it was put, has been all the time, and now is. In the case of *Onthank v. Lake Shore & M. S. R. Co.*, 71 N. Y. 197, a case very similar to this, *EARL, J.*, says: "Plaintiff's grant to the railroad is general and indefinite. It does not define or limit the place in which the pipe was to be laid, nor specify what water was to be conducted. Hence the surrounding circumstances, such as the existence of the spring, the channel over plaintiff's land, the execution of the deed by Brown, the topography of the country, and the acts of the parties both prior and subsequent to the grant, may be considered, for the purpose of learning the intention of the parties, and thus defining and limiting the easement granted. *French v. Hayes*, 43 N. H. 30. * * *"

After the grantee had once laid his pipe, and thus selected the place where it would exercise its easement thus granted in general terms, what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place. See *Jennison v. Walker*, 11 Gray, 423. In *Bannon v. Angier*, 2 Allen, 128, *BIGELOW, J.*, says: "Where a right of way, or other easement, is granted by deed, without fixed and defined limits, the practical location and use of such way or easement by the grantee, under his deed, acquiesced in by the grantor at the time of the grant,

and for a long time subsequent thereto, operate as an assignment of the right, and are deemed to be that which was intended to be conveyed by the deed, and are the same, in legal effect, as if it had been fully described by the terms of the grant." So long as the pipe is on Diffendal's land, it is seeking the street by the natural route of the topography; and as it was laid by the parties executing the contract, and the change of the location of the tank from the north side to the south side of the railroad track, which was done with the knowledge and acquiescence of Millner and Walker, and nearly 10 years before Diffendal bought the lot, did not in any way or degree affect the position of the pipe; nor does the use of the water flowing through the pipe affect either the spring itself or the land under which the pipe is laid. Both remain the same, whether the water conveyed be drunk in the depot or seeks the Dan river through the water-closets, or goes into the engines of the railroad company,

The court very properly dismissed the petition for a rehearing of the case upon the affidavit of the witness Millner, who had testified and been elaborately cross-examined by appellant as to the transaction referred to in his affidavit. But, even if there was reason for a rehearing, the petition was filed after the term of the court had ended at which the decree had been entered. *Hodges v. Davis*, 4 Hen. & M. 400; *Parker v. Logan*, 82 Va. 376. Even if, however, the facts set forth in the petition were true, and it had been filed in time, they would not justify a rehearing or review of the case. We are of opinion there is no error in the decree appealed from, and the same must be affirmed.

Petition for
rehearing.

McLELLAN

v.

ST. LOUIS & HANNIBAL R. CO.

(*Missouri Supreme Court, Second Division, February 24, 1891.*)

Conveyance of Right of Way—Breach of Conditions—Forfeiture—Collateral Attack.—A decree forfeiting a deed conveying a right of way to a railroad company for the non-fulfillment of conditions is binding and not subject to collateral attack in an action by the landowner, the grantee of the party making the deed, to eject the company purchasing the road built over such right of way under a foreclosure sale of the property of the company to which the conveyance was originally made, although such decree was entered without notice to a receiver of the original road appointed in the foreclosure suit, while the action to forfeit the deed was pending.

Same—Ejectment for Breach of Conditions—Acquiescence of Landowner—Estoppel.—The case being considered therefore as if no deed had been executed, it is held that since plaintiff's grantor, by his acquiescence or license, induced the original company to build its road and make permanent improvements upon the strength of his conduct, plaintiff cannot, after the lapse of many years, for the breach of a condition subsequent, such as the erection of fences or the construction of an underground passway, maintain ejectment against the company in possession, especially where he has recognized defendant's right of way by acquiescence and requesting it to fence and build cattleguards.

APPEAL from Circuit Court, Lincoln County.

This action of ejectment by respondent against the appellant was commenced August 24, 1887, for possession of a part of appellant's roadbed and right of way across respondent's farm in Lincoln county, Mo. The ouster was laid January 1, 1887. The answer of the defendant admitted it was a railroad corporation, and its possession of the land sued for; denied the other allegations, and relied on the statute of limitations. The answer, for a further defense, alleges that the St. Louis & Keokuk Railroad Company, on August 8, 1870, obtained by purchase from Thomas G. Hutt and wife, who then owned the lands now owned by plaintiff, a deed conveying a right of way 100 feet wide over said lands, and that said railroad fixed, located, and established its right of way and graded the same over and upon the strip of land sued for, and retained possession thereof, until 1873, when it was succeeded by the St. Louis, Hannibal & Keokuk Railroad Company, which last mentioned company, between 1873 and 1882, finished and completed and put in operation its road from Hannibal to Gilmore, Mo., and over and upon the lands sued for, and continued possession of said lands and operated said railroad to the 7th day of February, 1884, at which time, by order and decree of United States circuit court for the eastern district of Missouri, it, with all its property, rights, etc., was placed in the hands of a receiver appointed by said court. That said receiver at once took possession and control of said railroad, its property, rights, etc., and retained the same until December 18, 1885, when a sale thereof was made by order and decree of said court to John I. Blair, who afterwards transferred and conveyed the same to the defendant. That the deed from said Thomas G. Hutt to St. Louis & Keokuk Railroad Company contained the following clause: "That said railroad company shall construct two cattlepasses under their track on said premises at such points as shall be selected by their said grantor, Thomas G. Hutt, and shall also build and maintain a good post and board fence on each side of their track through all inclosures on said premises within three months after said road shall be completed and trains

run to Troy, Missouri; also make two crossings over said track in the field." That in 1883, the plaintiff, claiming to have purchased the lands of said T. G. Hutt, commenced his suit in the circuit court of Lincoln county, Mo., to have the grant of the right of way made by said Hutt declared forfeited by reason of non-compliance with the requirements in said deed, and in 1884, without service of notice or summons upon or appearance of the receiver of said St. Louis, Hannibal & Keokuk Railroad Company, obtained judgment in said circuit court, decreeing and declaring the said right of way forfeited, and that said judgment was void and of no effect. That plaintiff was estopped from claiming any benefit or advantages from said decree so rendered by the said Lincoln county circuit court, for the reason that, after obtaining said decree, and after this defendant had purchased said railroad and all its franchises and right of way, plaintiff acquiesced in and recognized defendant's right to the same and by his conduct waived all claim thereto, and by his conduct induced defendant to lay out large sums in maintaining said right of way and constructing fences along the same, and also filed an intervening petition in the United States circuit court for eastern district of Missouri, in which he admitted defendant's right to said right of way and possession thereof, but sought to recover damages for the same in the sum of \$5,000, and have the same declared a lien on defendant's said railroad. That by the allegations in his said petition, and submitting himself to the jurisdiction of said court, he waived all advantage he might have obtained by his decree in Lincoln circuit court. That said United States circuit court decreed he was not entitled thereto, and said judgment was final. Plaintiff's reply was a general denial of the new matter in the answer. A jury was waived, and cause heard by the court.

This state of facts is developed by the evidence: The right of way belonged to Thomas G. Hutt in 1870, and was a part of his farm of 552 acres in Lincoln County. On August 18, 1870, T. G. Hutt and wife, by their deed of that date, duly executed and acknowledged, and recorded in Book 7, page 77, conveyed the right of way, 100 feet wide, through said farm to St. Louis & Keokuk Railroad Company, for \$100, subject to the following conditions: "That said railroad company shall construct two cattlepasses under their tracks on said premises at such points as shall be selected by said grantor, to-wit, Thomas G. Hutt, and shall also build and maintain a good post and board fence on each side of its tracks through all inclosures on said premises within three months after said road shall be completed and trains run to Troy, Mo.; also make two crossings over said track in the

fields; and provided, further, that if said railroad shall not be constructed over and across said premises in 10 years from that date, the land should revert to the grantor. Under and by virtue of this deed the St. Louis & Keokuk Railroad took possession of the right of way, located and graded its road in 1872. Col. Hutt, the grantor, was then living on the farm, and continued to reside there until November 23, 1882, when he conveyed the farm to plaintiff. On March 4, 1873, the St. Louis, Hannibal & Keokuk Railroad Company succeeded to all the rights and franchises of the St. Louis & Keokuk Railroad; and prior to the year 1881 said road was completed and put in operation from Hannibal to Gilmore. The railroad has been in operation all the time since 1881. On 23d November, 1882, Thomas G. Hutt conveyed the farm to plaintiff, McLellan, "subject to the right of way granted to railroad." Plaintiff, J. M. McLellan, testified, in his own behalf, that the right of way contained about 12 acres, was worth \$4 or \$5 per acre, for rents, and that he was damaged \$250 or \$300. Cross-examined: "The railroad was built and in operation when I bought the land in 1882. The fills and cuts were made. No change in roadbed. Rent worth \$1 per acre. The farm is worth more with the railroad through it than it would be without a railroad. The building of the railroad has enhanced the value of the lands. The railroad was located and graded over the lands in 1872, when Col. Hutt lived on the place. He lived there till he sold to me in 1882, and knew the railroad was completed and in operation. The road has been in operation all the time since 1881. Told Walker, the superintendent, that if he did not fence the road I would have the deed forfeited. The company put in three cattleguards, at my request. After the decree of forfeiture, the company, at my request, built some fence. I wrote to Mr. Case, the superintendent, to have the right of way cleaned out. He sent a lot of hands and had it done. It was at my request. I wrote him a letter making the request, and called his attention to the fact that the law required that every railroad should clean off its right of way. The company built a fence after the decree of forfeiture. I objected only because it was not the kind of fence I wanted. I employed an attorney in St. Louis, in 1885, after the decree of forfeiture, to bring suit in the United States court against the railroad company for taking and appropriating the right of way. Redirect examination: The company built a five-wire fence part of the way before the decree of forfeiture, at my request. I notified them to clean off the right of way because the statute required it. Recross-examination: I objected to fences the company built, because they would not turn any-

thing. In my letter to the company I told them that the law required them to clean out the right of way." G. L. Thurmond testified: "Am acquainted with the land where the railroad runs through McLellan's farm. The rental value of the 12 acres would be 50 cents or \$1 per acre. Cross-examined: Lived near the land when railroad was put in operation. No change has been made. It has all been fenced for three years or more." About March 1, 1883, the plaintiff, McLellan, commenced an action in the circuit court of Lincoln county, Mo., against the St. Louis, Hannibal & Keokuk Railroad Company to forfeit and declare null the deed from Hutt to the company for the right of way for failure to build the fences and make the passes mentioned in the deed. The papers in the case are lost. The record entries are somewhat confusing. In one it is denominated an action for "damages," and in another, "injunction." However, Mr. Dunn, who was the attorney, says there was only one case, and that was for "specific performance," or to declare a forfeiture. R. H. Norton appeared for defendant, and filed a demurrer at the spring term, 1884. It appears that Mr. Norton withdrew as counsel for the railroad, and the cause was from that time entirely undefended. On April 2, 1884, the circuit court of Lincoln county made a conditional decree, reciting Hutt's deed to the railroad, and the condition in it that said company should construct two cattlepasses under its track at such points as should be selected by Hutt, and should maintain the fences, and ordered that the railroad proceed in 60 days to construct two cattlepasses, at such points as plaintiff might select, etc., and in default, the whole right of way should be declared forfeited and the deed null and void. At the fall term, 1884, these passes not having been constructed, the decree was made final, forfeiting the right of way. In the meantime, and while the suit was pending in the circuit court of Lincoln county, D. C. Blair, as trustee for certain bondholders, in a mortgage executed by said railroad company, commenced a suit in equity in the United States circuit court for the eastern district of Missouri, and on his application, on February 7, 1884, one Ervin C. Case was duly appointed receiver of said railroad, qualified, and took charge of all its property. It seems that this receiver never employed Mr. Norton to take any further steps in the Lincoln court. This receiver remained in charge of the railroad until March 30, 1886. It does not appear that the receiver had any notice that the suit of plaintiff for the forfeiture was pending in Lincoln. Nor was the order commanding the company to build the fences and passes in 60 days served on him. After the decree of forfeiture in the Lincoln circuit

court on June 5, 1885, plaintiff filed his intervening petition in the United States circuit court in the foreclosure proceeding of D. C. Blair against the railroad company, in which he recites his title and the forfeiture, and then proceeding, makes this allegation: "Your petitioner further avers that he has a lien upon said strip of land constituting the right of way of said St. Louis, Hannibal & Keokuk Railroad Company, paramount and superior to the rights of complainant or all persons claiming by or through or under said St. Louis, Hannibal & Keokuk Railroad Company; that by reason of the construction and location of said road through its premises and the appropriation of said right of way by said St. Louis, Hannibal & Keokuk Railroad Company, your petitioner is damaged in the sum of \$5,000; wherefore he prays judgment for said amount, and that the same may be declared a first lien upon said strip of land and the property of said railroad company, with prior rights to the mortgages sued on, and for such other relief as may seem meet and just." According to the practice in the federal court in equity, this intervening petition was referred to B. Gratz Brown, a special master, together with the demurrer of the complainant thereto. This demurrer was sustained by the special master, and his ruling afterwards, on June 25, 1885, was confirmed by the United States circuit court, and plaintiff's intervening petition dismissed. The defendant below offered in evidence the report of the master, and the order of the court above referred to, but, upon objection, the court excluded said records, to which defendant duly objected and excepted. Under a decree of the United States circuit court in the foreclosure proceedings, the St. Louis, Hannibal & Keokuk Railroad Company, its property, franchises, etc., were sold and conveyed by master's deed in December, 1885, to John I. Blair. John I. Blair, in February, 1886, conveyed the road to the defendant in this case, the St. Louis & Hannibal Railway Company. At the conclusion of the evidence the court declared the law as follows: "The court, sitting as a jury, is instructed to find a verdict for the plaintiff in this cause;" to the giving of which defendant duly excepted.

The following instructions were asked by the defendant and refused by the court: "(1) The court, sitting as a jury, is instructed that under the pleadings and the evidence in this cause the verdict will be for the defendant. (2) The court is instructed that the St. Louis, Hannibal & Keokuk Railroad Company acquired all the right, title, property, and franchise of the St. Louis & Keokuk Railroad Company, and that all the right, title, property, and franchises of the St. Louis, Hannibal & Keokuk Railroad Company was transferred and passed

to John I. Blair by the deeds read in evidence, and that the deed read in evidence from John I. Blair to the St. Louis & Hannibal Railroad Company conveyed to said last named railway company all the right, title, property, and franchises of the said John I. Blair. (3) Although the court may believe that the deed made by Thomas G. Hutt to the St. Louis & Keokuk Railroad Company was declared forfeited by the circuit court of Lincoln county, Missouri, yet, if you further find that at the time the said decree or judgment of forfeiture was rendered by said circuit court the St. Louis, Hannibal & Keokuk Railway Company had been and was then under the control, care, and possession of Edwin C. Case, as such receiver, and was not made a party to such suit, and did not enter his appearance therein as defendant, then the verdict will be for the defendant. (4) Although the court may believe from the evidence that the deed made by Thomas G. Hutt and wife to the St. Louis & Keokuk Railroad Company was declared forfeited by the decree or judgment of the circuit court of Lincoln county, Missouri, yet, if you further find that after the rendition of said decree or judgment the plaintiff acquiesced in or consented to the use and occupation of the land sued for as the right of way of the St. Louis, Hannibal & Keokuk Railroad Company, or the St. Louis & Hannibal Railroad Company, then the plaintiff cannot recover in this action, and the verdict will be for the defendant. (5) And the court is further instructed that if the plaintiff, after the rendition of said decree or judgment, notified and required the defendant to clean off and remove from said strip of land the vegetation and undergrowth thereon, and the said defendant, in pursuance of said notice, did clean off and remove such vegetation and undergrowth, then such act of the plaintiff must be construed to an acquiescence and consent to the use and occupation of said strip of land as a right of way for defendant's railroad. (6) If the court believes from the evidence that the plaintiff, after the decree of forfeiture, presented his intervening petition to the United States court in the case of D. C. Blair, trustee, *v.* The St. Louis, Hannibal & Keokuk Railroad Company for damages for the taking and appropriating the said strip of land for the right of way of the said railroad, then such act upon the plaintiff's part was a waiver of his right to the possession of said lands, and the verdict will be for the defendant. (7) Although the court may believe from the evidence that the conditions mentioned and set out in the deed from Thomas G. Hutt to the St. Louis & Keokuk Railroad Company were not complied with, and the decree of the circuit court of Lincoln county, Missouri, declared said deed forfeited for failure to fulfill and perform the conditions, yet

such failure did not and does not give the plaintiff any right to said lands as against the St. Louis & Keokuk Railroad Company and its assigns. (8) If the court find from the evidence that Thomas G. Hutt, the plaintiff's grantor, consented to the occupation of the lands in controversy by the said St. Louis & Keokuk Railroad Company and its assigns, for the purpose of constructing, building, and operating a railroad thereon, upon conditions expressed in the deed of said Thomas G. Hutt to said railroad company, even though the court should find that the said railroad company and its assigns did not comply with such conditions, the verdict will be for the defendant. (9) If the court believes from the evidence in this case that the defendant, and those under whom it claims, have been in open, notorious, and adverse possession of the lands herein sued for, claiming to own the same, for a period of ten years or more next before the commencement of this suit by plaintiff, the verdict will be for the defendant. (10) If the court believe from the evidence that the plaintiff bought the land on which the railroad was constructed and operated, subject to the right of way previously granted by Thomas G. Hutt and wife to the defendant railway company, or those under whom it claims, and that said defendant railway company, or those under whom it claims, entered and took possession of and occupied said right of way by and with the consent of Thomas G. Hutt and wife, then the verdict must be for the defendant. (11) If the court find from the evidence that the St. Louis & Keokuk Railroad Company took possession of said strip of land in 1872 or 1873, under the deed read in evidence from Thomas G. Hutt and wife, and excavated and graded said strip of land, and put the same in condition for receiving ties, rails, etc., and the defendant was in possession of said lands at the commencement of this suit, then the presumption is that the St. Louis & Keokuk Railroad Company and its assigns have remained in possession of said lands from the first entry thereof until the commencement of this suit. (12) The court instructs that the decree of the circuit court of Lincoln county, Missouri, declaring the deed made by Thomas G. Hutt to the St. Louis & Keokuk Railroad Company forfeited for conditions broken, did not give the plaintiff any better right to sue for the possession of said lands than he had before the rendition of said decree. (13) The court instructs that, although it may believe from the evidence that the conditions in the deed from Thomas G. Hutt and wife to the St. Louis & Keokuk Railroad Company were broken, yet if they [it] further find that said plaintiff is a purchaser of said lands from said Hutt, then the said plaintiff cannot take advantage of said broken conditions, and the verdict will be for

the defendant." Judgment for plaintiff for possession, rents, and profits.

Defendant's motion for new trial, which was overruled, assigned the following reasons: (1) Because the judgment is against the evidence; (2) because the verdict is against the law of the case; (3) because the court erred in giving instructions for plaintiff; (4) because the court erred in refusing to give instructions asked by defendant; (5) because the court admitted illegal and improper evidence offered by plaintiff; (6) because the court refused to admit proper and legal evidence offered by defendant; (7) because the judgment should have been for the defendant instead of for the plaintiff.

J. H. Orr and Martin & Avery, for appellant.
Norton & Dunn, for respondent.

GANTT, P. J.—This is an action of ejectment to obtain possession of a strip of land 100 feet in width, through plaintiff's farm in Lincoln county, Mo. The defendant and its predecessor, the St. Louis & Keokuk Railroad Company, have occupied this strip since 1872, as a part of the right of way for said railroad, a line running from Gilmore, on the Wabash, St. Louis & Pacific Railway to Hannibal. Thomas G. Hutt was the owner of this farm in 1870, and on 8th of August of that year conveyed this right of way through his farm to the St. Louis & Keokuk Railroad for \$100, subject to the following conditions, viz.: "That the said railroad company shall construct two cattlepasses under their track and said premises at such points as shall be selected by said grantor to-wit, the said Thomas G. Hutt, and shall also build and maintain a good post and board fence on each side of their track through all inclosures on said premises, within three months after said road shall be completed and trains run to Troy, Mo.; also to make two crossings over said track in the fields." Under this deed the railroad company took possession, and constructed its railroad, some time in 1872. The whole line was completed in 1880 or 1881. Hutt lived on the farm all the time the road was being constructed. There is no evidence that he ever selected any points where the company should make the two underground passes, nor that he ever complained of the failure to build the fences on either side of the railroad. In November, 1882, Hutt conveyed the farm to plaintiff by deed; which provides that the grant therein is "subject to the right of way granted the railroad." So that in this case the railroad company took possession and constructed its road by virtue of a deed. It was not a trespasser in the first instance.

Further
statement.

Plaintiff now seeks to eject the present company as the successor to the company that obtained the right of way in 1870, for the breach of the conditions subsequent in Hutt's deed, and as a preliminary step the record discloses that in 1883 he commenced an action in the circuit court of Lincoln county to have Hutt's deed forfeited; and, although the decree was obtained in defiance of all equitable or legal considerations, so far as the record discloses, as that court had jurisdiction of the parties and the subject matter, its judgment is binding in this collateral proceeding.

**Decree
binding.**

**Plaintiff es-
topped to
maintain
ejectment.**

The circuit court having declared Hutt's deed void for the failure of the company to build underground passes, and no appeal having been taken from that decree, we must consider the case as if no deed had ever been executed by Hutt and wife to the railroad. The decree does not extend further than to declare the deed null. Leaving the deed out of view then, what were the rights of the parties when this action commenced? It will hardly be questioned that until the decree of the Lincoln court was entered in the fall of 1884 the railroad company was lawfully in the possession of the land by virtue of the deed; the decree itself only undertook to operate prospectively on the title to the right of way. Under a valid power, then, defendant's predecessor had entered and constructed a railroad. This piece of land was a section of a through line. The company, by its charter, had acquired a line connecting it with the Wabash system on one side, and the important lines centering at Hannibal on the other. Expensive and permanent improvements had been made, all with the knowledge, assent, and acquiescence of Col. Hutt, the grantor in said deed. By the terms of that deed Hutt alone was authorized to select the places where these underground passes should be made. This he had never done. That Hutt could not have maintained ejectment with or without a decree setting aside this deed we think is clear. *Baker v. Chicago, R. I. & P. R. Co.*, 57 Mo. 265; *Bradley v. Missouri Pac. R. Co.*, 91 Mo. 493, 30 Am. & Eng. R. Cas. 379; *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256. Is the condition of plaintiff any better? According to his testimony he had lived in the immediate neighborhood over 25 years; knew the railroad was graded in 1872; knew that the railroad was located and operated through this land when he bought; saw the first shovel full of dirt ever thrown on it; was himself agent on the railroad bonds; took a deed from Hutt subject to this right of way. After obtaining his decree in the Lincoln circuit court he voluntarily submitted

himself, and his right to damages for the appropriation of this identical right of way, to the United States circuit court for the eastern district of Missouri, and asked judgment for \$5,000 damages, and that the judgment might be declared a lien on this particular strip. That court decided against him. He did not appeal from that decision. The defendant in this case is a purchaser from John I. Blair, who bought this road under the foreclosure proceedings in which plaintiff was an intervenor. After all this plaintiff requests the defendant to build fences to separate this strip from his farm. He requests the company to build cattleguards, and it does it. He notified its officers to clean off its right of way, and it does it. All this after his forfeiture of the deed. He testifies that his farm is worth more with the railroad through it, than it would be without a railroad; that the road had enhanced the value of his lands. The law will not permit a railroad company to appropriate a citizen's lands without just compensation, and our constitution provides every safeguard to protect him against wrong and oppression, and he can insist on the condition precedent that the damages shall be paid him, or into court for him, before he relinquishes his right; but it is equally well established that a landowner cannot, by his deed, or acquiescence, or license, induce a railroad to build its road, make permanent and costly improvements upon the strength of his conduct, and then for the breach of some condition subsequent, such as the erection of fences, constructing cattleguards, or making, as in this case, an underground pass-way, maintain ejectment. *Baker v. Chicago, R. I. & P. R. Co.*, 57 Mo. 265; *Provolt v. Same*, *Id.* 256; *Hubbard v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 68; *Masterson v. West End Narrow Gauge R. Co.*, 72 Mo. 342, 4 Am. & Eng. R. Cas. 439. These railroads are highways. They are permitted to exercise eminent domain, because of their *quasi* public character. Without this, under our system of government, there could be no justification of permitting them to condemn their right of way through the citizen's lands; and, having been created for this public purpose, the public acquires an interest to the extent that the public convenience requires they be maintained without unnecessary hindrance. *Walther v. Warner*, 25 Mo. 277. "In these great public works the shortest period of clear acquiescence so as to fairly lead the company to infer that the party intends to waive his claim for present payment will be held to conclude the right to assert the claim in any such form as to delay the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire an important interest in its con-

tinuance." *Provolt v. Chicago, R. I. & P. R. Co.*, 57 Mo. 256. Here, after standing by for many years, and knowing that the company had built this road and was maintaining it, the plaintiff bought this land. Notwithstanding plaintiff has managed to obtain an improvident decree, setting aside defendant's deed, he must still recover, if at all in this case, on his own deed from Hutt; and it is questionable whether he has increased his own estate by attacking defendant's title. Clearly Hutt would have been estopped; and plaintiff claiming under Hutt, with full notice, is in no better condition. His acquiescence, his pronounced recognition of defendant's right of way in solemn pleadings, his various written notices to the company, his delay of years even after forfeiture, his procurement of the building of a fence that would unmistakably segregate this right of way from the remainder of his farm and place it in the exclusive possession of defendants are all such clear recognition of defendant's title that the bare statement of the case carries its own convictions. *Gray v. St. Louis & San Francisco R. Co.*, 81 Mo. 126, 22 Am. & Eng. R. Cas. 109; *Cory v. Chicago, B. & K. C. R. Co.*, 100 Mo. 282, 44 Am. & Eng. R. Cas. 183. The court should have given defendant's first instruction, and committed error in giving plaintiff's instruction. For this error the judgment of the circuit court is reversed.

Conditional Conveyance of Right of Way—Forfeiture for Breach of Condition.—See *Mayor, etc. of Macon v. East Tenn., Va. & Ga. R. Co. (Ga.)*, 4 Am. & Eng. R. Cas. 462; note 43 *Id.* 587.

License Permitting Railroad Company to Enter Upon Land—Power to Revoke.—In *Messick v. Midland R. Co.*, (Ind. Sup. Ct. April 11, 1891), 27 N. E. Rep. 419, it was held that a license given by a landowner permitting a railroad company to enter upon his land and construct its roadbed is revocable only as long as it is executory; and after the company has spent large sums of money under such license, the power to revoke is lost. Citing *Buchanan v. Logansport, C. & S. W. R. Co.*, 71 Ind. 265; *Lane v. Miller*, 27 Ind. 534; *Snowden v. Wilas*, 19 Ind. 10; *Stephens v. Benson*, 14 Ind. 367; *Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223; *Midland R. Co. v. Smith*, 113 Ind. 233.

Conveyance of Land to President of Corporation—Contract to Re-convey on Certain Conditions.—Plaintiffs in due form conveyed a tract of land to the defendant W., who was then the president of the other defendant, a railway corporation. As part of the same transaction, W. acknowledged, in writing, under seal, that he held the land in trust for the corporation, to be used for certain purposes; and in the same writing contracted with the plaintiffs that he would reconvey the land to them if the corporation did not, within three years, take, use, and occupy the same in whole or in part, for terminal purposes. The corporation was cognizant of the conveyance and contract, and assented to them. *Held* that, as between the parties, the deed and the concurrent contract must be considered and treated as one instrument. *Chute v. Washburn*, 44 Minn. 305.

Conveyance of Right of Way—Quantity of Land Acquired.—In *Fort Wayne, C. & L. R. Co. v. Sherry*, 126 Ind. 334, it was held that where a deed con-

veyed to a railroad company "The right of way for its railroad, and the right to construct said railroad agreeably to, and in accordance with the laws of the state of Indiana, known and designated as 'An Act to provide for the incorporation of railroad companies,' approved May 11, 1852, and all amendatory acts thereto passed by the legislature, and to construct said railroad over and through the tract of land held and owned by the grantor in Fayette county, Indiana, to-wit, along the line of said railroad as now located," the deed did not necessarily vest in the grantee land six rods in width, the statute providing that a railroad company may acquire that quantity of land for its right of way, but only the quantity of land actually taken and used by the grantee. The court said: "A railroad company is not bound to purchase a strip six rods in width, nor can it be implied from such a deed as the one before us that it obtains, by gift or by purchase, a right to that quantity of land. Certainly no one would contend that a company could be held liable for dangerous places in land not acquired, although they might be within the limits of a strip six rods in width, for it is clear that it can only be liable for negligence respecting land actually forming part of its right of way; and yet, if, in every instance, it acquires a strip six rods in width it will be liable, although, in fact, its right of way may not be more than half the width mentioned in the statute. It is, however, unnecessary to discuss at length the question, for our decisions authoritatively settle it. *Indianapolis & V. R. Co. v. Reynolds*, 116 Ind. 356; *Lake Erie & W. R. Co. v. Michener*, 117 Ind. 465; (*vide opinion*, p. 469, 117 Ind.) *Cincinnati, I. St. L. & C. R. Co. v. Geisel*, 119 Ind. 77; *Indianapolis & V. R. Co. v. Lewis*, 119 Ind. 218. The cases to which we have referred determine all the questions in the record against the appellant."

WILEY *et al.*.

v.

ELWOOD.

(*Illinois Supreme Court, October 31, 1890.*)

Maintenance of Coal Shed by Railroad Company—Nuisance.—The maintenance by a railroad company of a coal shed on its right of way, creating grinding noises, and scattering dust and dirt, although not a nuisance *per se*, may become such by reason of the particular locality in which it is situated. Where such a structure is located in the heart of a city, and the comfort of the occupants of adjoining residences is destroyed, and their health injured, the question whether or not it is located in a proper place is properly left to the jury.

Same—Public Nuisance—Right of Adjoining Owner to Maintain Action.—A nuisance may, at the same time, be both public and private. Accordingly, the owner of a house situated near such coal shed and who is disturbed by the noise, and whose property is injured by the dust may bring an action therefor, even though the nuisance in question may be regarded as a public one.

Conveyance of Land to Railroad—Improper Use—Illinois Constitution.—Although under the Illinois Constitution of 1848, compensation in condemnation proceedings is only awarded for land taken, and not for damages to land not taken, a conveyance of land to a railroad company, while such constitution is in effect, does not prevent those claiming adjoining land under the same grantor, from claiming damages to their property caused by the

company's use of the land conveyed to it, where it appears that the conveyance did not specify the use to which land was to be put. Damages for an improper use cannot be regarded as having been paid for by the price named in such conveyance.

APPEAL from Appellate Court, Second District.

Haley & O'Donnell, for appellants.

Benjamin Olin and C. W. Brown, for appellee.

MAGRUDER, J.—This is an action on the case, brought in the circuit court of Will county by the appellee, Elwood, against the appellants, Wiley and Sutherland, and also against the Michigan Central Railroad Company and the Joliet & Northern Indiana Railroad Company, to recover damages sustained by the plaintiff below during the month from June 4 to July 5, 1888, in the use, occupation, and enjoyment of his dwelling house, caused by the erection and operation by the appellants of a large coal shed adjoining said dwelling house in the city of Joliet, and the handling therein of large quantities of coal by means of machinery driven by steam power, whereby intolerable noises were produced, and great quantities of coal dust and dirt were cast upon and into said house, which dust and dirt continually settled down in large quantities upon the furniture, books, food, clothing, and other things in the house, to the great annoyance of the plaintiff, and so as to be destructive of the comfort and health of himself and his family, and cause material injury to his possession, use, and enjoyment of his house. Under the instructions of the court, the jury, upon the trial below, found the two railroad companies not guilty, and returned a verdict of guilty against the other defendants, the two appellants here. Judgment was entered upon the verdict. The appellate court has affirmed the judgment, and the case comes here by reason of a certificate of importance granted by that court.

The dwelling house and the coal shed are both located upon the south half of block 17 in Bowen's addition to Joliet. The south half of this block lies between Jefferson street, on the north, and Washington street, on the south, and between Michigan street, on the west, and Eastern avenue, on the east. On July 3, 1854, Joel A. Matteson and wife executed a deed conveying to the Joliet & Northern Indiana Railroad Company the south part of the south half of the block lying between Michigan street and Eastern avenue, fronting south on Washington street, and having a width or depth of 130 feet. It is claimed that this strip, 130 feet wide, was leased by the Joliet & Northern Indiana Railroad Company to the Michigan Central Railroad Company, though no such lease was produced in evidence. On May 2, 1887, the Michigan Cen-

tral Railroad Company leased the strip to the appellant J. S. Wiley, of Davenport, Iowa, for three years, at a nominal rental of one dollar per year for the storage and sale of coal, the lessor reserving the right to terminate the lease if the business should not be conducted to the satisfaction of the company, or the latter should desire the property for its own use. The coal shed in question was erected upon this strip early in the summer of 1888 by Wiley, whose superintendent or manager is the appellant Sutherland. On July 4, 1854, Joel A. Matteson and wife also executed a deed conveying to N. D. Elwood, the father of the appellee, the undivided half of that part of block 17 lying between the south line of Jefferson street and the north line of the strip sold on the day before to the Joliet & Northern Indiana Railroad Company, said strip having a depth or width of about 145 feet, and extending from Michigan street to Eastern avenue. Appellee acquired his title as devisee under his father's will, and by deed from his father's executor. His house is located upon the strip so sold to his father, and fronts upon Jefferson street. The south line of his lot adjoins the north line of the lot on which the coal shed stands, and water from the eaves of the latter falls upon the lot. He built his house, and improved the grounds around it, and occupied it as a home, many years before the coal shed was erected. The coal shed is about 610 feet long, 28 feet high, and from 54 to 56 feet wide, built of lumber, with a stone foundation, and a roof covered with tarred paper. It is open at the west end and on the south side, and has an open space on the north side, between the siding and roof, so that the coal dust escapes upon the adjoining premises. Cars are switched from the railroad tracks into the shed upon a raised platform. The coal is thrown into an iron hopper by means of an iron scraper operated by steam power, and is then received into an iron conveyor, run by steam, and lifted from 20 to 28 feet high, and emptied into a chute or trough plated with iron, and conveyed through the same, and dumped upon the floor through openings in the chute. The shed will store 24,000 tons of coal. In June, 1888, from 15 to 23 carloads of coal per day were delivered into it, each carload holding from 12 to 20 tons. About 23 cars would be unloaded in one day. This process of lifting, conveying, and dumping the coal by means of machinery from the top of the shed to the floor below, in large masses, causes the coal to break and grind when coming in contact with the iron conveyor, etc., and produces, not only deafening noises, but clouds of coal dust. The evidence tends to show that the locality in question is in a thickly settled portion of the city, and that there are many houses and stores near plaintiff's

residence on Jefferson street, and also south of Washington street and east and west of the other streets above named. Many of the owners and occupants of these houses and stores were put upon the witness stand, and swore that they also were annoyed and injured by the noises and coal dust in question in the use and enjoyment of their respective properties.

In *Cooper v. Randall*, 59 Ill. 317, we held that such testimony was admissible to show the extent and character of the injury sustained by the plaintiff, and as tending to prove that the nuisance objected to was capable of inflicting the injury complained of. It is urged, however, by the appellant that, by the testimony thus admitted, the nuisance was shown to have been a public one, and that a private action will not lie for injuries suffered from a public nuisance.

**Plaintiff's
right to
maintain
action—
Public nuisance.**

Counsel for appellants thus state their position: "The annoyance complained of by the plaintiff is only such as he, in common with the public, is subjected to, and therefore he cannot have a private action to redress his supposed injury." Undoubtedly the general rule is that public or common nuisances, which are defined by Blackstone to be those "which affect the public, and are an annoyance to all the king's subjects," can only be proceeded against by indictment, but it is a well established rule that where a person sustains, by reason of a public nuisance, a special damage, different from that which is common to all, he is not precluded from maintaining his action for such damage. *Wood, Nuis. §§ 618, 653.* The doctrine that special damage must be shown in order to justify a private action for injury growing out of a public nuisance had its origin in the consideration of nuisances growing out of obstructions to highways and navigable streams. For instance, if a man dug a ditch across a public highway, the traveler would have no action for the inconvenience which he suffered from the interruption in common with the rest of the public; but if his horse fell into the ditch, and was killed, he would thereby suffer a special damage, not common to others. The strictness of the original rule has been greatly modified since the days of Lord Coke. Recovery may be had for damages which are consequential, as well as direct. *Id. §§ 620, 621.* An individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. *Lansing v. Smith*, 4 Wend. 10. The doctrine now is that a nuisance may be at the same time both public and private. The use of a steam engine in a crowded street may be a public nuisance, but in a case where the smoke from it also injured the goods in a man's shop, and made his dwelling un-

comfortable, it was held to be such a private nuisance as would give him a right of action. *Wood, Nuis. § 649*. In *Francis v. Schoelkopf*, 53 N. Y. 152, it was held that, although the stench from a tannery injured a large number of houses, yet the plaintiff, whose dwelling was made uncomfortable, and almost uninhabitable, was entitled to sue for her particular injury. In the case at bar, if the coal dust falls upon the furniture, food, and clothing in appellee's house, he suffers a special damage to his own property, even though it be true that coal dust from the same coal shed falls upon the man who passes on the street in front of his door, or upon similar articles of property in his neighbor's house. If the noise of the grinding machinery deafens him in his own dwelling, the rest and quiet which he is entitled to enjoy in his home are disturbed, and he is none the less injured because the home of his neighbor is rendered unendurable from the same cause. Injury to a vested right is a sufficient special damage to maintain an action against the promoter of a public offense. *Wood, Nuis. § 656*. As was said in *Francis v. Schoelkopf*, *supra*: "It is no defense for a wrongdoer, when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted a like injury upon numerous other persons." We therefore think that the court below committed no error in overruling the motion of the defendants to exclude the plaintiff's evidence, inasmuch as the plaintiff was entitled to maintain his action, even though the nuisance in question could be regarded as a public one.

The next error assigned by the appellants is the refusal of the trial court to give certain instructions, which stated to the jury, in substance, that the Michigan Central Railroad Company would have had the right to erect and operate the machinery in the coal shed, upon the alleged ground that such operation was a lawful railroad use of the right of way, and that the company had a right to license Wylie to do what it could itself thus do; that the original owner of the south half of block 17, by his deed to the lessor of the Michigan Central Railroad Company, received a consideration thereby for all future injury to the portion of the block retained by him growing out of such lawful railroad use of the part so deeded and sold; that, therefore, appellee, holding title under such original owner, is without redress for the damages occasioned by such use. We are of the opinion that there was no error in the refusal of the instructions in question, for the reasons hereinafter stated. The charter of the Joliet & Northern Indiana Railroad Company has not been introduced in evidence, and therefore it does not appear whether or not that company had any authority to lease the property to the Michigan Cen-

tral Railroad Company; and, if it did so lease it, it does not appear, in the absence of such lease, and of the charter of the Michigan Central Railroad Company from the record, whether or not the latter company was authorized to make the lease to Wylie. Nor does it appear from either of the deeds above referred to, or otherwise, that the land on which the shed stands was conveyed to the Joliet & Northern Indiana Railroad Company, or held by it, as right of way. But we will treat the case, as the counsel on both sides seem to do, as though the Michigan Central Railroad Company was the lessee of the Joliet & Northern Indiana Railroad Company, and as though the coal shed stood upon the railroad right of way and as though the appellants were authorized to use the shed and the machinery in it for the same purposes for which their lessor could have used it.

1. The deed from Matteson to the Joliet & Northern Indiana Railroad Company did not recite that the strip therein described was conveyed for the purpose of constructing a railroad, or for any purpose connected with the construction or use of a railroad, or for any purpose connected with the preservation, occupation, and enjoyment of a railroad. It was a simple conveyance of land in fee-simple, without any reference to the use to which it was to be applied. When it was made, no part of the Joliet & Northern Indiana Railroad had been built. Moreover, the deed was executed in 1854, while the constitution of 1848 was in force. Under that constitution, compensation in condemnation proceedings was only awarded for the land taken, and not for damages for the land not taken. It cannot be claimed that a simple deed or grant of land for right of way to a railroad company will be presumed to have any greater effect than a condemnation judgment. It is said that, as condemnation proceedings are presumed to consider and include all damages suffered, so deeds of rights of way are presumed to include all damages arising from a proper construction of the improvement. But it is difficult to understand how, under the constitution of 1848, where the owner only received, as the result of the condemnation proceeding, compensation for the land taken, and not damages to the land not taken, a deed of land to a railroad company made when that constitution was in force can be presumed to have been in consideration both of compensation for the land conveyed and of future damages to the land not conveyed, in the absence of anything on the face of the deed to show that the land was conveyed for any particular purpose, or that the parties had in mind any damages to accrue to other land. *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363, 29 Am. &

Conveyance to
railroad—im-
proper use.

Eng. R. Cas. 558; *Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 27 Am. & Eng. R. Cas. 415. The position of appellants is that the consideration of the deed from Matteson to the Joliet & Northern Indiana Railroad Company included, not only the value of the strip 130 feet wide thereby conveyed, but also all damages thereafter to result from the construction and operation of the railroad to the strip 145 feet wide, deeded the next day to N. D. Elwood. In *Chicago, R. I. & P. R. Co. v. Smith*, *supra*, we said: "A mere conveyance of a tract of land might not give to the grantee the right to make any use of it which would injuriously affect any other land, for the law would attach the same condition as in general exists with respect to the holding of all land,—that the owner shall so use it as not to produce injury to another. But in the case before us there is the grant for this very use itself, which will injuriously affect other land, and for no other use." The doctrine announced in some of the text-books, that where land has been acquired for railroad purposes by deed or grant, as well as by condemnation, all damages to the portion of the owner's land not taken, for which an action would lie at common law, are presumed to have been considered in fixing the price, may well be applied to such a deed or grant made in this state since the constitution of 1870 went into force. That instrument provides that "private property shall not be taken or damaged for public use without just compensation." But the doctrine can certainly have no reference to a simple deed made before the adoption of the constitution of 1870, and containing no statement of any use which was to be made of the land conveyed. It is to be noted that the point here discussed is not whether there was any remedy for injury to the land not taken before the adoption of the constitution of 1870, but whether damages for such injury could be regarded as paid for by the price named in such a deed, conveying the land taken, as the deed above described. We think that such could not be the effect of the deed.

2. In any case where the doctrine contended for can be applied, it only contemplates that the grantor, or those holding under him, shall be prevented from recovering damages for such injuries as arise from the proper construction of the road, and such as necessarily result from or attend upon its ordinary and prudent operation. Railroads are a public necessity, and a public benefit. Many inconveniences and annoyances grow out of their operation, which must be borne by the public. The passage of a train of cars upon the street of a city or town is necessarily attended with noise, with the emission of smoke,

Right of action for public nuisance.

with detention at the crossing, etc. No recovery can be had for injuries suffered from such causes. But a railroad company has the power to do certain things which it has also the discretion to do in particular ways and at particular places. It needs grounds upon which it may receive and discharge its freight and passengers. It may use its right of way for such purposes. Its discharge of a certain kind of freight at one place upon its right of way may work serious injury to property owners, while its discharge of the same at another place thereon may not produce any such injury. The selection of a locality where damages are inflicted, in preference to one where damages will not be inflicted, cannot be said to be necessary to the ordinary and prudent operation of the road. In the present case, the company, or those authorized by it, 33 or 34 years after the original construction of the road, erected this coal shed, and placed in it a new contrivance, worked by steam power, for unloading coal, in the heart of a city, in a locality thickly settled, and surrounded by residences and stores, creating thereby grinding, grating noises, and scattering dust and dirt that destroy the comfort, and injure the health, of those living upon the adjoining property. Here was a new use of the right of way, not contemplated at the time of the original grant, and not resorted to for many years thereafter. The construction of the shed in 1888 could not have been anticipated by appellee, who built his house in 1876, and began to occupy it in 1881. This structure, though not a nuisance *per se*, became such by reason of the particular locality in which it was situated. It is as much the duty of a railroad company as of an individual to so use its property as not to injure others. The question whether or not the coal shed and its machinery were located in a proper place was fairly left to the jury by the instructions of the court. In *Illinois Central R. Co. v. Grabill*, 50 Ill. 241, where a cattle-pen, kept by the railroad company near the premises of the plaintiff, was the source of noxious smells, rendering such premises unwholesome and uninhabitable, it was held that such indispensable structures, even though the right existed to erect them in the heart of a city, ought to be located at such a distance from populous neighborhoods as to avoid the injurious results produced by them. In *Cooper v. Randall*, 59 Ill. 317, which was an action for damages to plaintiff's premises, arising from a flouring mill on a lot near such premises, which threw upon them chaff, dust, dirt, and other impurities, the following instruction was approved: "A flouring mill is not necessarily a nuisance, nor unlawful in its use, management, or purpose. A man has a right to erect a mill in a proper place, to run, use it, etc., in a proper manner; and,

if said mill is in a proper place, used and operated in a proper manner, and without material injury to the possession of the reversionary right or interest of plaintiff, the jury should find for defendants." "Material injury" was there defined to be a real and not an imaginary or fanciful interference with the reasonable enjoyment of the property. In *Whitney v. Bartholomew*, 21 Conn. 213, the action was for damages to plaintiff's property by reason of a carriage factory and blacksmith shop occupied by defendant on his own land, adjoining the lot on which stood the plaintiff's dwelling house. It was shown that cinders, ashes, and smoke from the chimneys of the shop were thrown upon plaintiff's house, land, clothes, etc., and that the ashes, etc., fell into her well, etc. Judgment for plaintiff was affirmed, and it was there held that the factory and shop were not nuisances *per se*, but that "the shop was erected and the business pursued, in an improper place;" that some things not unlawful, became so "in respect to the time, place, or manner of their performance;" that defendant was bound to use the shop, even though on his own land, so as not to injure his neighbor; "that, of trades which are lawful, some may be nuisances in cities which are harmless in the country." *Shively v. Cedar Rapids, I. F. & N. R. Co.*, 74 Iowa, 169, was an action against a railroad company to recover damages, wherein it appeared that the company built and maintained stock-yards within 60 feet of plaintiff's lot, for the use of shippers over the road, and that there were emitted therefrom foul odors, which rendered plaintiff's house almost uninhabitable, and endangered his health, etc. It was claimed that the yards were necessary to the operation of the road, and that the owners could not be prevented, even where the yards were properly conducted. Judgment for plaintiff was sustained, and the court said: "It is not shown that they [the odors] are unavoidable; nor does it appear that the yards might not have been located at another place, where they would have met the necessities of the road and its patrons." It was thus left to the jury, by the instructions in this case, to say whether this particular mode of handling coal, and unloading it from cars, was a proper mode or not. If unloading coal in this shed, with such machinery, upon the company's right of way was a part of the necessary operation of the road, plaintiff could not be precluded from a recovery for injuries thereby suffered unless such process of unloading was prudent, careful, and proper. We perceive no error in the record which would justify a reversal. The judgment of the appellate court is accordingly affirmed.

Liability of Railroad Companies Maintaining Nuisances in the Form of Coal Sheds, Stockyards, Machine Shops, etc.—The leading authority in this country upon this subject is the case of *Baltimore & P. R. Co. v. Fifth*

Baptist Church, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15. In this case it was shown that an act of congress had authorized the defendant railroad company to bring its tracks within the limits of the city of Washington, and to construct such works as were necessary and incidental for the completion and maintenance of its road. By virtue of this act the company constructed workshops immediately adjoining a church building, and in the necessary use of such shops created much noise and much smoke and soot, whereby worship in the church was interfered with. In an action by the church corporation against the railroad company to recover damages, it was held that the plaintiff was entitled to judgment, and that the provisions of the act of congress constituted no defense. It was *held*, that whatever the extent of the authority conferred by congress, it was accompanied by the implied qualification that the works should not be so placed as to unreasonably interfere and disturb the peaceful and comfortable enjoyment by others of their property. FIELD, J., said: "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large."

In *Cogswell v. New York, New Haven & H. R. Co.*, 103 N. Y. 10, 27 Am. & Eng. R. Cas. 376, the defendant had erected an engine house adjacent to plaintiff's dwelling house, which was so used as practically to deprive plaintiff of the use of his house as a residence, and by filling it with smoke and dust corrupting and tainting the air with offensive gases, made life therein uncomfortable and unsafe. The court of appeals held that this constituted a palpable nuisance, for which an action for damages would lie and which a court of equity would enjoin. Defendant, in this case, sought to justify its acts by virtue of the statute authorizing it to run its cars over the track of another company "upon such terms and to such point as has been or may hereafter be agreed upon by and between said companies." The corporation over whose tracks the defendant ran its cars had agreed to furnish it with room for the engine house, and the defendant contended that this constituted a legislative authorization. The court, however, held that the statutory sanction which will justify an injury to private property must be express or must be given by clear and unquestionable implication from the powers expressly conferred. It cannot be presumed from a general grant of authority that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent. The court said that "it may have been the right of the company to acquire lands by purchase for the accommodation of its business, but it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Public policy, indeed, requires that in adjusting the mutual relations between railroad companies and individuals, courts should not stand upon the assertion of extreme rights on either side, but in this case the facts leave no room for doubt that the plaintiff has suffered a substantial and unauthorized injury."

In *Brown v. Eastern & Midlands R. Co.*, L. R. 22 Q. B. Div. 391, 37 Am. & Eng. R. Cas. 558, it appeared that upon a piece of ground acquired by a railroad company under Parliamentary powers for the purpose of diverting a road, the company had collected a heap of refuse, consisting of road scrapings. The plaintiff's horse shied at this heap and upset the cart, injuring plaintiff. In an action for such injury it was held that the heap of refuse constituted a public nuisance, and a judgment for the plaintiff was affirmed by the court of appeal.

In *London, B. & S. C. R. Co. v. Truman*, L. R. 11. App. Cas. 45, 25 Am. & Eng. R. Cas. 116, however, it appeared that the railroad company had purchased land near one of its stations and had used it as a yard or dock for their cattle traffic. To the occupiers of the houses near the station the noise of the cattle and the drovers was a nuisance. It did not appear, however, that there was any negligence in the mode in which the company conducted their business. It was held by the House of Lords, reversing the chancery division, that since the purpose for which the land was occupied was directly authorized by the Parliamentary act of the railroad company, and being incidental and necessary to the authorized use of the railway for cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons, and that the adjoining occupiers were not entitled to an injunction to restrain the company. "It would be very strange, indeed," said the Lord Chancellor, "if the legislature could be supposed to authorize the railway to commit a nuisance up to a certain point to have provided machinery for extending the railway and its use beyond that point, and yet to have allowed the further user to be open to an action to restrain its use."

In *Tuebner v. California St. R. Co.*, 66 Cal. 171, 19 Am. & Eng. R. Cas. 147, the act complained of was the maintenance of a steam engine on property adjoining plaintiff's, for the purpose of propelling street cars by means of a cable, by which use plaintiff's adjoining building was constantly shaken, the plaster cracked, and the premises covered with soot, besides a loud and continuous noise being produced. The court held that this constituted a nuisance for which the street car company was liable, and that a license from the municipality to operate such road and all machinery necessary thereto, was not a justification of such nuisance. The court said: "If the smoke or dust, or both that rises from one man's premises and passes over and upon those of another, causes perceptible injury to the property or so pollutes the air as seriously to impair the enjoyment thereof, it is a nuisance. But the inconvenience must be something more than mere fancy—mere delicacy or fastidiousness; it must be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain, sober, and simple notions."

In *Shively v. Cedar Rapids, I. F. & N. R. Co.*, 74 Iowa, 169, the action was for damages for the maintenance by the defendant railroad company of a stockyard giving forth noisome and unhealthy odors, so near plaintiff's house as to render the same uninhabitable. At the trial, the company asked the court to charge the jury to find for the defendant on the ground that stockyards were necessary to the operation of their railroads, and the odors could not be prevented in stockyards properly conducted. The court held that this instruction was properly refused, since the odors were not only annoying but unwholesome and not shown to be unavoidable, and the defendants having failed to show that the yards might not have been located elsewhere and have met the necessities of the road.

In the case of *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182, the nuisance complained of was the operation and use of a coal-chute by the defendant company on its right of way. The plaintiff was the owner of a dwelling house near the railroad, and claimed that the use of such chute created a great deal of smoke and dust which was blown upon and about his house, and that the noise made by the use of the chute was a great nuisance. Plaintiff's property was 93 feet from the right of way, and did not abut thereon. It was not claimed that the chute was negligently built or improperly operated. The court held that the company was not liable in

damages, saying: "Railroads cannot be operated without fuel and proper structures for supplying engines therewith are necessary to be maintained at convenient points for that purpose; they are necessarily incidental to the operation of the road."

In the case of *Illinois Central R. Co. v. Grabill*, 50 Ill. 241, noticed in the principal case, it appeared that the railroad company had located cattle pens on their right of way for the purpose of shipping. The plaintiff sued to recover damages for the disturbance of her enjoyment of premises owned by her, caused by the negligent and improper manner in which such cattle pens were maintained. The court, through Chief Justice BREESE, held, that it was the duty of the railroad company to see that their pens did not become nuisances and generate unwholesome gases to the detriment of property owners, and that, if by reason of negligence and carelessness in respect to such pens they were suffered to become such a nuisance, rendering the homes of those in the vicinity uncomfortable and unwholesome, the company must respond in damages for the injury occasioned.

In *Hooper v. North British R. Co.*, 1 Macph. 499, the business by a railroad company of hardening rails whereby loud noises were made, was adjudged a nuisance.

In *Ohio & M. R. Co. v. Simon*, 40 Ind. 278, plaintiff sued to recover damages caused by a nuisance consisting of cattle pens maintained by a railroad company. Upon demurrer to the complaint, it was held that the offense constituted a nuisance, and gave a right of action. The case went against the plaintiff, however, upon the statute of limitations.

It would seem, then, that the principal case is entirely in accord with the weight of authority. A railroad company is subject to the law of nuisances to the same extent as individuals or other corporations, and the legislative authorization to construct its road and maintain the necessary works in connection therewith, gives it no exemption from liability in this regard. For a note upon the general subject of nuisances as connected with the law of railroads see 11 Am. & Eng. R. Cas. 27.

BEATTIE

v.

CAROLINA CENTRAL R. CO.

(*North Carolina Supreme Court, March 3, 1891.*)

Abandonment of Right of Way—Failure to Complete Road.—The failure of a railroad company to complete its road, and permitting the owners to use the land upon which its line is located for the prescribed statutory period, and for purposes inconsistent with its occupation and use as a railroad, is evidence of an intention to surrender the easement, and may constitute an abandonment of the right of way.

Same—Agreement for Right of Way—Failure to Construct Road.—The plaintiff's grantor entered into an agreement with the predecessor of the defendant company to relinquish a railroad right of way through his land, in consideration of the advantages to be derived by him from the construction of the road. The agreement was not a deed, but a mere executory agreement to convey, and was not recorded. The company merely graded the land, and then abandoned work for 25 years. Plaintiff purchased the land 9 years after the grade was completed, and proceeded to cultivate it,

including the graded parts, continuously for 16 years. At the end of that time the construction of the road was resumed and completed. *Held, (a)* that the company could not claim title to the right of way under § 150 of Code N. Car., providing that a railroad company shall not be barred of its real estate, right of way, easements, etc., "which may have been condemned, or otherwise obtained," by any statute of limitation or adverse occupancy: *(b)* that the original right of way had been lost by abandonment, and that the plaintiff was entitled to compensation for the taking of his land.

How Perfect Title to Right of Way may be Acquired.—*It seems* that a perfect title to a right of way can be acquired by a railroad company only (1) by a formal deed of conveyance from the owner; (2) by condemnation and the actual payment of just compensation ascertained in the mode appointed by law; (3) by the performance of an act or the payment of a sum, or by furnishing any consideration agreed upon in some executory contract which a court of equity will enforce between the owner and the corporation; or (4) where the general law or charter sanctions such a course, by completing the road over the land, and thereby incurring the liability to pay damages whenever assessed on petition and adjudged to be due.

THIS was a proceeding for condemnation of right of way, tried at September term, 1889, of the superior court of Cleveland county, before CONNER, J. The facts agreed were as follows: (1) That on 27th October, 1855, and for some time previous thereto, the land described in the complaint was owned and possessed by William H. Cabiniss, under whom plaintiff claims title, having purchased in 1869, and that plaintiff is now the real owner of said land. (2) That on the said 27th October, 1855, the said William H. Cabiniss, being then the owner of said land, executed and delivered to the Wilmington, Charlotte & Rutherford Railroad Company, under whom defendant claims title, as hereinafter stated, a paper writing of which the following is a copy, to-wit: "State of North Carolina, Cleveland county. This indenture witnesseth that we, whose names are hereunto subscribed, do hereby relinquish to the Wilmington, Charlotte & Rutherford Railroad Company the right of way for said road through all and every piece or parcel of land respectively owned by us, severally, in the county of Cleveland; and we do this in consideration of the prospective advantage which may accrue to us arising from the road's location through our county. Witness our names, October 27, 1855. WM. H. CABINISS." (3) That this paper writing had reference to the land described in the complaint, and that it was duly proven, probated, and registered, as required by the statute, 28th June, 1886. (4) That said Wilmington, Charlotte & Rutherford Railroad Company thereupon proceeded to locate, and did locate, their road over said land as hereinafter described; and upon said land a deep cut was excavated, and a long embankment erected, about the year 1856 to 1860, and that in 1885, when

defendant completed its road, as hereinafter stated, the said cut and embankment were still distinct, though on the latter had grown up some pine trees in part, and the other part of it was cultivated, and had been since 1869. (5) That the other facts in this case are exactly as stated in the facts agreed upon in writing by the undersigned attorneys in the case, *C. Hendrick v. C. C. R. R. Co.*, now pending in this court, and we hereby adopt said facts as filed in said case as the facts in this, in addition to those above stated, with the following exceptions, to-wit: *First*, that paragraph No. 1 thereof be stricken out; *second*, that the portion in reference to the Forbis heirs, being minors and non-residents, be stricken out; *third*, that the plaintiff's name be substituted in place of "C. Hendrick" wherever the latter occurs. Upon these facts the following order was made by Judge CLARK: "Upon the foregoing facts agreed, the same being presented to the presiding judge, and a jury trial being waived, it is adjudged that the petitioner is entitled to the relief demanded in his petition. And it is further ordered that E. D. Dickson, D. S. Lovelace, and S. G. Brice be, and they are hereby, appointed commissioners to value the right of way over the land described in the complaint of petitioner, and as therein described. They shall proceed according to the directions of respondent's charter, first giving to the parties twenty days' notice of the time and place of making said valuation, and shall report their proceedings hereunder under their hands and seals to this court. WALTER CLARK, Judge Presiding." Exception by defendant. On the coming in of the report the following judgment was entered: "This cause coming on for final hearing upon report of the commissioners to assess damages to the plaintiff for the causes stated in the complaint, and said commissioners having made due report thereof, in which they assess plaintiff's damages at two hundred and eighty-five dollars, and there being no exceptions filed to said report, it is now, on motion of McBrayer & Ryburn, attorneys for plaintiff, ordered, considered, and adjudged that said report be, and the same is hereby, in all things confirmed, and that the plaintiff have and recover of the defendant the said sum of two hundred and eighty-five (\$285) dollars, with interest thereon from the 5th day of August, 1889, (the term to which said report was returned,) till paid, and the costs of this action, to be taxed by the clerk." The defendant appealed, relying in part upon the exception previously entered to the ruling of Judge CLARK.

R. McBrayer, for appellee.

Batchelor & Devereux and *T. H. Cobb*, for appellant.

AVERY, J.—In *Hendrick v. Carolina Central R. Co.*, 101 N.

C. 617, it was clearly settled that the bargainee of an original landowner, upon whose land the Wilmington, Charlotte & Rutherford Railroad Company had located its line and done a portion of the grading without laying the superstructure before the year 1860, was not barred of recovery in a proceeding instituted within two years after the completion of the line over his land by the defendant company, which purchased the franchise of the original company making the location, and succeeded to its liability under its charter to pay such damage as might be assessed in a proper proceeding commenced by the owner within two years after the road should be finished over his land. While it is admitted that the action was begun within two years after the portion of the road located on plaintiff's land was completed, the defendant insists that the plaintiff is estopped from claiming damages for said right, because his title was acquired in the year 1869, through and under one William H. Cabiniss, who, being then the owner, was one of the persons who executed on the 27th of October, 1855, the following paper: "State of North Carolina, Cleveland county. This indenture witnesseth that we, whose names are hereunto subscribed, do hereby relinquish to the Wilmington, Charlotte and Rutherford Railroad Company the right of way for said road through all and every piece or parcel of land respectively owned by us, severally, in the county of Cleveland, and we do this in consideration of the prospective advantage which may accrue to us arising from the road's location through our county. Witness our names, October 27, 1855. WM. H. CABINISS." The Carolina Central Railroad Company succeeded to the rights of the Wilmington, Charlotte & Rutherford Railroad Company in the year 1873, and was organized after a foreclosure sale in the year 1880, the facts being fully recited in *Hendrick v. Carolina Central R. Co., supra*. Between the years 1856 and 1860 the original company surveyed its line of road through the land of the plaintiff, then owned by said Cabiniss, and after excavating a deep cut, and making a fill on the premises, suspended work. Neither the Wilmington, Charlotte & Rutherford Railroad Company nor the defendant company assumed any control of the right of way on plaintiff's land, nor caused any grading or other work of construction to be done on said land, or on any part of their line between Shelby and Rutherfordton, from the year 1860 till the year 1885, when the work was resumed and the grading finished, so that the trains ran from Shelby to Rutherfordton over the plaintiff's land the next year. During this suspension of operations for 25 years, Cabiniss sold to the plaintiff, who had been plowing over and

Defendant's
position—
Facts:

cultivating a portion of the land, on which the location was made, for about 17 years, when the defendant entered upon his premises and began the work of construction afresh. Passing over the question whether the description in the contract offered as evidence of title by the defendant was too vague to be enforced after it was executed, or admitting for the sake of argument that it was sufficiently definite, because its location could be made certain by a survey, which was contemplated by the parties in entering into the agreement, we must still bear in mind the fact that the paper writing is not a deed, because it is not sealed, and wants apt legal words to make it an effectual conveyance of an interest in land. At the time of its execution it could have been construed, in the most favorable view for the company, only as an executory contract to convey the right of way, whenever the road should be located and finished over the land of Cabiniss. 5 Am. & Eng. Ency. Law, p. 441, (pt. 17.) and note 3; *Avent v. Arrington*, 105 N. C. 377. The only consideration moving Cabiniss was the benefit to be derived from finishing and operating the line of railroad over his land. Under this agreement, entered into October 27, 1855, the contracting corporation marked out a proposed line across his land in the year 1856, and during the four years immediately following made the excavations heretofore mentioned. The work of construction then ceased for 25 years, during which period there was no obligation on the part of the Wilmington, Charlotte & Rutherford Railroad Company to finish its line from Shelby to Rutherfordton. Neither Cabiniss nor his grantee, Beattie, could compel that company or its successor, the defendant, to complete the road over the land, and impart to it thereby the enhanced value which it was supposed would be consequent upon its completion. The owners of the land would have been helpless, if during that long period of time the line had been diverted north or south of that surveyed and partially graded, or if Shelby had become the settled western terminus. If Cabiniss and his alienee held 100 feet extending through the land subject to the right of the corporation to treat them as tenants at sufferance at the option of its managers for 17 years, when would that relation cease by non-user on the part of the company and adverse occupation by the servient owner? It was contended for the defendant on the argument that the facts in this case brought it within the principle decided in *Carolina Central R. Co. v. McCaskill*, 94 N. C. 746, 25 Am. & Eng. R. Cas. 83, and therefore that upon the execution of the paper writing by Cabiniss, or certainly after fixing the location by a survey

Nature of agreement.

Easement acquired by defendant.

and partial completion of the grading on his land, the contracting company, and subsequently its successors, acquired an easement of infinite duration, and a right in the land that could not be barred by adverse possession. We cannot concede the correctness of this view as an interpretation of the Code or an inference or deduction from the authority relied upon. *Carolina Central R. Co. v. McCaskill, supra.* ^{Interpretation of code.} It is provided in section 150 of the Code that "no railroad, plankroad, turnpike, or canal company shall be barred of or presumed to have conveyed any real estate, right of way, easement, leasehold, or other interest in the soil, which may have been condemned or otherwise obtained for its use, as a right of way, depot, station-house, or place of landing, by any statute of limitation or by occupation of the same by any person whatsoever." The plaintiff's land has never been condemned and therefore, unless the defendant company had obtained the easement otherwise before he began to cultivate the right of way, he will not, by reason of this section, be deprived of whatever benefit might, in other cases, have accrued to him from his adverse possession. The word "obtained" must have been used in the sense of "secured" or "acquired." The consideration of the contract was by its express terms the prospective advantage which might accrue to the signers arising from the location through their county. ^{Consideration of contract.} No benefit could be derived by the owner from the mere act of surveying the line across his premises, and indicating it by stakes, nor even from making excavations or fills, so long as the corporations failed, as they did for 31 years, to complete and equip the road so as to furnish him the means of shipping the products of the soil, and of ready communication with and access to the commercial centers of the country. The location, in the restricted sense of surveying and adopting the line, in which engineers use it in this country, would not of itself have been attended with the slightest advantage to the owner. The defendant and its predecessors failed for over 30 years to finish and for 25 years to work upon or assert any dominion over the right of way, and yet, when it at last reached the conclusion that the work should be completed, insisted that the courts should so construe section 150 of the Code as to treat the plaintiff as its tenant at sufferance of the track and a strip of land 100 feet on either side of it, which he had been cultivating continuously for 16 years. Neither the defendant, nor those under whom it claims, had any title to the easement. Upon the completion of the road over plaintiff's land within a reasonable time the corporation might have relied upon the equitable right arising out of the

agreement either in a suit to compel the plaintiff or Cabiniss to convey the easement, or as a defense in a proceeding instituted by either of them to have the right of way formally condemned and the damages assessed. But the corporation had not obtained the easement, and had not given the promised *quid pro quo* for it; and, while its managers were considering the question whether they could or would ever give the plaintiff the contemplated advantages of a completed railroad, the plaintiff was plowing over and raising crops upon the very land marked out for the location of the track, an assertion of dominion over it that was utterly inconsistent with the active exercise of the defendant's right to the easement, by which alone it could perfect its title to it. If the easement had not been acquired by condemnation, or otherwise obtained, then the statute (Code, § 150) has no application, and we may leave its provisions out of view in determining the question whether the conduct of the parties was such that the defendant would be deemed to have abandoned or allowed to become extinguished any right growing out of the execution of the agreement by Cabiniss. In other states, where corporations are

not protected by such a statute, and in England, it seems to be settled that while mere non-user may not defeat or impair the rights of a railroad corporation in a located and unfinished or unoccupied line, the owner of the fee may retain the title (unincumbered by the claim to an easement therein) to the whole or any part of a location by adverse occupancy for the requisite statutory period, where the conduct of the company has been such as to indicate its intention to abandon the use of the line; and this rule has prevailed even where the right of way has been condemned, and in some instances paid for, 2 Wood, Ry. Law, § 240; Norton v. London & N. W. R. Co., 13 Ch. Div. 268. The failure to complete a road, and permitting the owners to use the land upon which its line is located for the prescribed statutory period, and for purposes inconsistent with its occupation and use as a railroad, is evidence of an intention to surrender the easement, and has been held to be an abandonment of it, because such conduct is calculated to induce the belief that the corporation does not propose to again assert its rights. Mills, Em. Dom. § 57; Hooker v. Utica & Minden Turnpike Co., 12 Wend. 371; Locks, etc., v. Nashua & L. R. Co., 104 Mass. 1; Benedict v. Heineberg, 43 Vt. 231; Ang. Water-Courses, §§ 252, 252a; Jennison v. Walker, 11 Gray, 423; Taylor v. Hampton, 4 McCord, 96.

The use of the land by plowing up and cultivating the very portion of the 200 feet of right of way marked out for the track, was utterly inconsistent with its actual occupation as

the roadbed of the defendant company. *Crain v. Fox*, 16 Barb. 187; *Pope v. Devereux*, 5 Gray, 409. He was planting yearly crops, that the defendant must of necessity destroy if it should determine to complete its line to Rutherfordton. His claim that the right to the servitude has been abandoned and lost is founded not simply upon non-user on the part of the defendant, but upon the claim that this adverse occupation and use of the land on his own part is irreconcilable with the acknowledgment of the right to the easement in the corporation, and that therefore he is entitled to the benefit of the bar of any statute that may apply. *Angell, supra*, §§ 244, 246, 252; *Bannon v. Angier*, 2 Allen, 129. The fact that the plaintiff bought in the year 1869, when there had been a cessation of the work of construction for 19 years, according to many authorities, made it incumbent on the corporation claiming the easement to show an intention to resume control of the right of way within a reasonable time. *Corning v. Gould*, 16 Wend. 531; *Taylor v. Hampton, supra*; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65. Where rights of way are actually condemned, Lewis, in his work on Eminent Domain, § 656, says: "The weight of authority undoubtedly is that in the absence of statutory provisions on the question the effect of proceedings for condemnation is simply to fix the price at which the party condemning can take the property sought, and that even after confirmation or judgment the purpose of taking the property may be abandoned without incurring any liability to pay the damages awarded." The author states that the doctrine laid down by him is sustained in all of the appellate courts of the states where the question has arisen except those of New York and Nebraska. *Id.* p. 844; *Chicago v. Bartian*, 80 Ill. 482. An executory agreement to convey, founded upon the consideration of completing a road over the land, places the parties in relations, in some respects, similar to those which ordinarily exist after condemnation proceedings, and before a corporation has elected to use the easement and has paid for it, or incurred a liability to make compensation for it. Where there is neither a conveyance of the easement, nor an executory contract in reference to conveying it, the corporation does not acquire a perfect title until it either satisfies the judgment for damages for a condemned right of way across a tract of land, or finishes its road over it, or in some way incurs such liability to pay the resulting damages, when assessed. *Lewis, supra*, § 306.

Inconsistent
use of land.

Title not ac-
quired until
considera-
tion is paid.

Cabiniss agreed in effect that the Wilmington, Charlotte & Rutherford Railroad Company should have the right to the

casement whenever it should give him the advantages and benefit arising from finishing its line over his land.

How valid title may be acquired.

Our case falls within the rule, which seems to be settled by authority, that perfect title to a right of way can be acquired only (1) by a formal deed of conveyance from the owner; (2) by condemnation and the actual payment of just compensation ascertained in the mode appointed by law; (3) by the performance of an act or payment of a sum, or by furnishing any consideration agreed upon in some executory contract which a court of equity will enforce between the owner and the corporation; or (4) where the general law or charter sanctions such a course by completing the road over his land, and thereby incurring the liability to pay damages whenever assessed on petition and adjudged to be due. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 306; *Lewis, supra*, pp. 404, 405, §§ 306, 656; *O'Neill v. Freeholders of Hudson*, 41 N. J. Law, 172; *St. Louis & S. E. R. Co. v. Teters*, 68 Ill. 144.

The charter (Laws 1854-55, chap. 225, § 28) provides "that in the absence of any contract or contracts in relation to the land through which said road, or any of its branches, may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner thereof, it shall be presumed that the land over which said road, or any of its branches, may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to said company by the owner or owners thereof, and the said company shall have good right and title, and shall have, hold, and enjoy the same so long as the same shall be used for the purposes of said road, and no longer, unless the person or persons owning the land at the time that part of the road which may be on said land was finished, or those claiming under him, her, or them, shall apply for an assessment of the value of said lands, as hereinbefore directed, within two years next after that part of said road which may be on the said land was finished," etc.

It appears, therefore, that where there is a contract the charter leaves it to be interpreted, as any other agreement between the parties would be, according to its terms. How, then, would an agreement on the part of one person, that he relinquished the right to a private way over his land to an adjacent landowner, for the consideration of getting a good outlet for himself to a neighboring town, be construed if the party proposing to construct the road should grade a portion of it within 5 years, and then desist for 25 years, and

Rights the same as if agreement had not been signed.

until a grantee of his neighbor had plowed over the proposed line of road, and cultivated the land for 16 years? If, in such a case, the person seeking to get the outlet would be deemed to have abandoned his right under the original contract, and driven to the necessity of pursuing the plan pointed out by statute for the condemnation of cartways, then we think that in this case, as between the plaintiff and the defendant company, their relations and rights would be the same as if no paper had been signed by Cabiniss in 1855.

When the plaintiff bought the land in 1869, the corporation had desisted from the work of construction for nine years before, and during the five years that had then elapsed after the close of the war had asserted no claim to the right of way, and had taken no steps looking to the completion of its road over it. Its conduct had been such as to induce the reasonable belief in his mind that their claim had been extinguished, and that he would take the land discharged from any right to subject it to the servitude without compensation by the subsequent completion of the road over it. The predecessor of the defendant had allowed an unreasonable time to elapse without evincing any intention to resume control of the right of way, and, after the plaintiff paid his money for land apparently subject to no such right, it would be inequitable to allow the defendant to appropriate his land without compensation. *Hooker v. Utica & Minden Turnpike Co.*, 12 Wend. 371. Even if mere non-user would not, as between the original parties to the contract, have extinguished the right (which is not admitted), the rule is different where the land is sold to a purchaser for value, who is misled by the conduct of the corporation. *Corning v. Gould, supra*. It appears as a fact agreed that the contract signed by Cabiniss was not registered until the 28th of June, 1886, while it does not appear that the plaintiff had actual notice that any agreement had been entered into between the Wilmington, Charlotte & Rutherford Railroad Company and Cabiniss when he purchased. The deserted excavation was not in the actual possession of the corporation. The plaintiff, seeing the unfinished grading done upon the land, might naturally infer, in the absence of any record of condemnation proceedings or registration of a conveyance (if such registration would have been noticed), that Cabiniss was awaiting the completion of the road over the land to institute proceedings for damages, and that the right to exact compensation, if the work should be resumed, passed with the title to the land to him. *Hendrick v. Carolina Central R. Co.*, *supra*. Being misled by the long delay of said corporation, and having no actual notice of the equitable interest claimed by it,

Purchaser
misled.

we think that the plaintiff took the title free from any right growing out of said contract to subject it to the servitude without compensation other than the benefit arising from completing the road. *Francis v. Love*, 3 Jones, Eq. 321.

As we have already stated that the defendant could not, at best, claim that he held a deed of conveyance for the right of way, but only the equitable right to demand a

Defendant's
claim equivalent
to prayer
for specific
performance.

conveyance upon the completion of the road over the plaintiff's land, he might, in order to determine his rights, have taken the initiative when the portion of the road on plaintiff's land was finished, and have brought an action to compel the plaintiff to convey the easement, or he might have taken the chances of acquiring the easement by the laches of the plaintiff if the latter failed to file his petition within two years, and, when the latter instituted proceedings, have set up the contract as a defense, as he has done. But in either event, whether the corporation is the actor or not, its claim is equivalent to a prayer for the specific performance of the contract. It is well settled that delay on the part of a vendee or proposed purchaser, accompanied by acts apparently inconsistent with the purpose of performing the contract, will, if not waived by the vendor, deprive the former of the right to demand a specific performance of the contract. *Francis v. Love*, 3 Jones, Eq. 321; *Love v. Welch*, 96 N. C. 200; *Holden v. Purifoy*, 12 S. E. Rep. 848 (decided at this term;) *Mizell v. Burnett*, 4 Jones, (N. C.) 249. In the case of *Crain v. Fox*, 16 Barb. 187, it was held that plowing over a right of way was not an act inconsistent with the claim to the easement, and in *Corning v. Gould*, *supra*, that the erection of a fence across it constituted an adverse holding. See, also, *Pope v. Devereux*, 5 Gray, 409. Kent says (volume 3, 552:) "If the act which presents the servitude be incompatible with the nature or exercise of it, and be by the party to whom the servitude is done, it is sufficient to extinguish it, and when it is extinguished for a moment, it is gone forever." The same principle is laid down in numerous cases. *Canny v. Andrews*, 123 Mass. 155. In the case of *Hendrick v. Carolina Central R. Co.*, *supra*, it was held that non-user for 10 years was an abandonment by a railroad company of its right of way. *Horner v. Stillwell*, 35 N. J. Law, 307; *Veghte v. Raritan Water Power Co.*, 19 N. J. Eq. 143; *Mills*, *supra*, § 57. We have not overlooked the fact that the statute of limitations was not running from May, 1861, till January 1, 1871. But we forbear to pass upon the effect of the adverse possession as a bar to the assertion of defendant's claim under the contract, as to point out a particular statute as applicable, and rest our decision upon other grounds.

1. The conduct of the company through which defendant claims had been such as reasonably to lead the plaintiff to believe, when he bought in 1869, that it had abandoned the purpose of completing the road. Conclusions.

2. The plaintiff bought without actual notice of the contract with Cabiniss, and the fact that grading had been done on the land did not preclude the idea that the damages might be assessed if it should be completed under the charter.

3. If Cabiniss were substituted as plaintiff in place of Beattie, or if it appeared that the latter had actual notice of the contract, we think the courts should not, in the wise and just exercise of their discretionary power, enforce the agreement with Cabiniss for the benefit of the defendant, after so long a delay on the part of the latter and those through whom it claims, in performing its implied stipulation to finish the road within a reasonable time, and when their conduct was calculated to lead the owner to believe that the claim of an equitable right in his land under the contract had been abandoned.

There is no error, and the judgment must be affirmed.

Abandonment of Right of Way.—See *Fernow v. Chicago, etc. R. Co.* (Iowa), 36 Am. & Eng. R. Cas. 420; *Henderson v. Central Passenger R. Co. (C. C.)*, 25 *Id.* 42; *Crolley v. Minneapolis, etc. R. Co. (Minn.)*, 14 *Id.* 47; *Chance v. East Texas R. Co. (Texas)*, 12 *Id.* 169; *Troy & Boston R. Co. v. Boston, etc. R. Co. (N. Y.)*, 7 *Id.* 49, *Central Iowa R. Co. v. Moulton & A. R. Co. (Iowa)*, 10 *Id.* 138.

PROVOST

v.

MORGAN'S LOUISIANA & TEXAS R. & S. S. Co. *et al.*

(*Louisiana Supreme Court, July Term, 1890.*)

Donation of Right of Way—Failure to Construct Road—Reverter.—In case an individual makes a gratuitous donation of a right of way to an alleged corporation, under the belief and written stipulation that a railroad is to be constructed thereon, and from which her other property is to be enhanced in value, when in fact there was no such corporation then or afterwards in existence, and no such railroad then or afterwards constructed, the act or donation may be annulled, and the property recovered by the donor.

Same.—In Case Such Property is Conveyed to Another Corporation by the donee it will be bound by the recitals contained in the deed of its author, to the effect that if said road is not built said land is to revert to the donor.

Same—Estoppel.—Such an act having been superinduced by the misrepresentations of the donee, no estoppel arises on the act or others of contemporaneous date. The same rule applies with equal force to parties and privies.

APPEAL from District Court, Parish of Iberia.

Don Caffery, for appellant.

T. D. Foster, for appellees.

WATKINS, J.—On the 25th of April, 1883, the plaintiff donated to the Jeanerette & Cypremort Railroad Company, of which George Whitworth claimed to be president, a strip of land 34 feet in width, extending through her property, to be used by said company as a right of way for their track, and other purposes connected with building or maintaining their road. On the 12th of October subsequently said Whitworth, as president, transferred all of the rights of the Jeanerette & Cypremort Company under said donation to the Morgan Company, and the latter commenced, soon afterwards, to excavate, and build a switch thereon. Soon afterwards this suit was brought for the purpose of annulling said donation and sale, on the ground that at the time of the execution of the donation of the right of way she was under the impression and by said Whitworth had been led to believe that the Jeanerette & Cypremort Railroad Company was a duly organized and existing corporation, when in point of fact there was no such corporation in existence at that time or since. She prays judgment revoking and annulling said donation and sale; that she be restored to the possession of the property; that the defendants be sentenced to remove therefrom all of the constructions and works thereon erected; that they be decreed to be co-trespassers on her property, and, as such, condemned to pay her \$3,250 as damages for their trespass and wrongful entry, and \$10 per day during their continued wrongful occupancy, subsequent to the 8th of November, 1883, when suit was filed. The principal defense of the Morgan Company is an estoppel grounded on the allegation that had plaintiff not dealt with the Jeanerette & Cypremort Company, granting it the right of way, the work complained of would not have been done, which it values at \$1,000 and demands judgment in reconvention against the plaintiff, and calls in warranty both Whitworth and the Jeanerette & Cypremort Company, and demands like judgment against them as shall be rendered against it *in limine*. The defendants and warrantor, Whitworth, tendered a variety of dilatory pleas, none of which are insisted upon here, and finally pleaded first, estoppel, on the ground that the plaintiff had sold, without solicitation, town lots to the Jeanerette & Cypremort Company, and had thereby gained certain advantages, and in each deed of conveyance had recognized that company's corporate existence. He also pleaded that plaintiff had stood by and seen the work performed by

the Morgan Company, and thus sanctioned it; and has since claimed it. The alleged Jeanerette & Cypremort Company is in court on similar pleas and issues. Subsequently Whitworth personally and as president pleaded a general denial, and set up the aforementioned contracts, and alleged that plaintiff sold the right of way to induce the company to purchase said lots, and deny any and all damages. The judgment rendered in the premises annulled the acts referred to touching the right of way, and declared the strip of land donated to belong to the plaintiff on the ground that the Jeanerette & Cypremort Company had never been incorporated, ordered the Morgan Company to vacate the premises, and restore same to the plaintiff; and condemned Whitworth personally and the Morgan Company *in solido* to pay plaintiff the sum of \$500 as damages and \$50 per annum from the 8th of November, 1883, until the property is surrendered into plaintiff's possession. There was judgment in favor of the Morgan Company on its call in warranty. Each of the defendants have appealed.

There is no claim made in any of the defendant's answers or proof adduced on the trial to the effect that there ever was such a corporation in existence as the Jeanerette & Cypremort Railroad Company. The main reliance of all the defendants is on the estoppels urged against the plaintiff. But the evidence conclusively proves that in executing the acts of donations and sales aforesaid (and they are all of contemporaneous dates, or very nearly so) she was by Whitworth erroneously induced to believe that the company was duly incorporated and organized, and that he was its president, he well knowing that such was not the case. It is also in evidence that the plaintiff would not have made the donation if she had known the truth, as her inducement to make the grant was the building of the road. As the company had no existence, certainly the president—or the person alleging himself to be such—cannot avail himself of his own misrepresentations to defeat the plaintiff's action, or employ the fruits thereof as an estoppel against her demand for restitution of the property. Bigelow, Estop. p. 225. As, in favor of one who knew the truth, an estoppel is unavailing. *Watkins v. Cawthon*, 33 La. Ann. 1104; *Stockmeyer v. Oertling*, 38 La. Ann. 102; *Succession of Harris*, 39 La. Ann. 443. The proof further shows that the plaintiff did not remain silent, but, shortly after the Morgan Company began work, she entered a formal protest, and, it not being heeded, she entered suit, the citation being served a few days subsequently to the transfer. The two sales that plaintiff made to the Jeanerette

Estoppel
urged against
plaintiff not
availing.

& Cypremort Company were executed under the effect of the same misrepresentations as the donation of the right of way, and are governed by the same rule of interpretation as it is. The Morgan Company occupies just the same situation

Right of sec-
ond corpora-
tion.

as Whitworth did: for in the deed granting to the Jeanerette & Cypremort Company the right of way the following recital occurs, viz.: "Whereas, the Jeanerette and Cypremort Railroad Company * *

are about commencing the construction of a railroad from Jeanerette to Week's Island, * * * and the said road is to pass through my property, and it is believed [that] it will increase its value, in consideration thereof, and of the payment to me of one dollar, * * * I hereby sell, transfer," etc. And it concludes thus, viz.: "If said road is not built, said land is to revert to me." It was this title that the alleged president of the Jeanerette & Cypremort Company assumed to convey to the Morgan Company, without first perfecting its organization, or doing any act looking to the construction of the contemplated railroad, which the plaintiff expected to improve the value of her remaining property. The Morgan Company is held bound to know the recitals contained in the written title of its author. In disregard of them it went to work immediately after it had taken title, notwithstanding its author's obligation to build a railroad from Jeanerette to Week's Island, and commenced the building of a switch on the right of way. The acts and deeds of the plaintiff to the vendor of the Morgan Company cannot any more avail the latter than the former. All the defendants possessed full knowledge of all the facts, and none of them were deceived or injured or induced to alter their previous positions on account of them. Not only does the proof show that no attempt was ever made to build the railroad, but it shows also

Land reverts
to plaintiff.

that no charter was ever signed, no organization ever effected, and no part of the capital stock paid in. It is a self-evident proposition that a contract cannot be made with a corporation which has no existence at the time. *Mor. Priv. Corp.* §§ 137, 139. Not only was such the condition of things in 1883, when the acts in question were executed, but it continued to exist up to and inclusive of the year 1889, when the trial of this cause occurred. No railroad has yet been commenced, and no corporation has yet been organized. Hence the Morgan Company acquired no title or right of use, except such as were subject to and subordinated by the express terms of the original grant; and the judgment decreeing plaintiff's ownership and right to possession is manifestly correct. The preceding statement demonstrates the correctness of the judgment

against Whitworth personally; for inasmuch as he did not represent the corporation which he assumed to represent, his act bound him in his individual capacity. He bound himself, personally by attempting to personate a non-existent corporation. But we do not regard the proof sufficient to sustain the damages that are awarded the plaintiff in the judgment appealed from. The Morgan Com- Damages.pany has dismantled its switch and sidings, and seems to have used an honest effort to restore the *status quo*. The only damage plaintiff appears to have suffered is from a few slight excavations on her land, for a distance of about 100 yards, and we think \$250 would be an ample sum to remunerate her for any loss she may have sustained on that account, and to that amount the judgment should be reduced and affirmed. It is therefore ordered and decreed that the judgment appealed from be amended, by reducing the amount of damages to \$250, and that, as thus amended, same be affirmed, the plaintiff and appellee to be taxed with the cost of appeal.

BREAUX, J., recused, as having been of counsel.

ERIE & NIAGARA R. CO.

v:

ROUSSEAU *et al.*

(17 Ontario Appeal, 483.)

Title Against Railway by Adverse Possession.—A title by adverse possession may be acquired as against a railway company to lands originally obtained by them for railway purposes.

THIS was an appeal from the judgment of FALCONBRIDGE, J.

The action was brought by the plaintiffs to recover possession of certain lands in the town of Niagara to which the defendants claimed title by virtue of the statute of limitations.

The lands in question were conveyed to the plaintiffs by the Bank of Upper Canada, who were the grantees from the Crown, on the 19th of March, 1866, and the plaintiffs re-conveyed them to the bank by way of mortgage to secure a balance of purchase money. The mortgage not being paid, the trustees of the bank, in whom in consequence of the failure of the bank the mortgaged property had become vested, brought an action for the recovery of the lands, and the plaintiffs also brought an action against the trustees (presumably for redemption though this was not shown in evidence) in which a decree was made by consent on the 15th of September, 1869, vesting lands in question in certain persons and the trustees of the

bank, and directing these persons and the trustees of the bank to execute to the present plaintiffs a lease in perpetuity at a nominal rental of so much of the lands and premises in question in that action as were then actually used and enjoyed by the present plaintiffs for railway purposes, the description including the land in question in the present action. It was not shown that any lease had been executed in pursuance of this decree, and it was admitted that the defendants and their predecessors in title had been in actual and exclusive possession of the land in question for more than twelve years before the commencement of the action.

The action came on for trial before MACMAHON, J., at St. Catharines on the 15th of October, 1888, when an order was made, by consent, referring the action and all questions therein to SENKLER, Co. J., of the county of Lincoln, who subsequently made a report in favor of the defendants, and an appeal by the plaintiffs from this report was dismissed by FALCONBRIDGE, J.

H. Symons, for the appellants.

H. H. Collier, for the respondents.

OSLER, J. A.—It was not shown that any lease had been executed in pursuance of the decree, but it may be assumed in the plaintiffs' favor that they have an equitable title to such an interest as would have been conferred upon them by such an instrument as is mentioned in the decree. That at all events is what they rely upon.

Their first contention is that they acquired under the decree an easement only, over the land in question, of which the possession has not been enjoyed by the defendants for a period long enough to deprive them of it. If this contention was well founded it would be destructive of the action, which is to recover the land, not to restrain the defendants from interfering with the easement. I agree however with the learned referee, that to whatever the plaintiffs resort as the root of their title, whether it be the conveyance from the grantees of the Crown (the Bank of Upper Canada) or the decree, it is the land itself which was conveyed and granted, and not a mere easement over it.

Next they say that the defendants cannot acquire a title by the Statute of Limitations because the plaintiffs are merely lessees, or owners of the land for railway purposes, and that as well by limitation of their statutory powers as by the terms of the lease as defined by the decree they would be unable to alienate the land for other purposes, or to execute a conveyance which would vest any title in the defendants.

Plaintiffs' equitable title.

Acquisition of easement.

Adverse possession—Plaintiffs' contention.

The plaintiffs referred to the act of incorporation of the Erie and Ontario Railway Company, 5 Wm. IV. chap. 19, as containing their charter powers, but as that company afterwards and before the year 1866, appears to have been "vested in and incorporated with" the Erie and Niagara Railway Company, formerly the Fort Erie Railway Company, under the 27 Vic. chap. 59, we must look at the provisions of the latter act to ascertain the plaintiffs' powers, and among other clauses of the Railway Clauses Act, C. S. C. chap. 66, which are incorporated with and made part of the Act by § 17 is § 9 (2), which empowers the railway company to purchase, hold, and take lands necessary to the construction, maintenance, accommodation, and use of the railway, and also to alienate, sell, and dispose of the same. Even under the Act which incorporated the Erie and Ontario Company, that company are by the first section declared capable, not only of purchasing and holding any estate, etc., for the use of the company, but also, of letting, selling and otherwise departing therewith for the benefit and on account of the company from time to time as they shall deem necessary and expedient. But as I have said the plaintiffs' powers at the date of the transactions in question seem to have been the (possibly) more extensive ones conferred by the Act 27 Vic. chap. 59.

Statutory provisions.

It is an entire misapprehension of the terms of the decree, and the lease thereby directed to be executed, to suppose that it contains (as argued) a limitation of the purposes for which the land is granted. The words "for railway purposes proper" are merely part of the description of the property granted, *i. e.*, so much of the land now actually used by the Erie and Ontario Railway "for railway purposes proper," that is to say, etc.

"For railway purposes" construed.

There is no evidence that the land in question is part of the permanent way (if that would have made any difference), or essential to the use and enjoyment of the railway as a public concern. Probably as a matter of convenience or even profit it would be useful to the company, and they may have to acquire it again. But I see no reason for believing that they could not have sold it or leased it if they had desired to do so, and that being the case I think they were liable to lose it by the operation of the Statute of Limitations if they permitted or overlooked the defendants' occupation for the necessary period. The case really falls within the express words of the fourth section of the Real Property Limitation Act, R. S. O. (1887) chap. 111. There are no words in the defendants' charter to control the operation of that Act, and in *Bobbett v. South Eastern R. Co.*,

Land not essential to railway.

9 Q. B. D. 424, it was held by DENMAN, J., that the mere fact that land of a railway company is required for the purposes of their undertaking, and is not superfluous land, does not prevent an occupier who has had exclusive adverse possession for twelve years from becoming thereby entitled to the land under the Statute of Limitations. No doubt the case did not in the end turn upon that point, but it was very carefully considered by the learned judge, and the plaintiffs have not in my opinion succeeded in showing that he was wrong.

I refer also to Norton v. London and North Western R. Co., 13 Ch. D. 268.

The right of the reversioner at the termination of the lease in perpetuity is not a matter which either of the parties need greatly concern themselves with at present. As regards the plaintiffs' interest in the land I think it is gone, and the appeal should therefore be dismissed. The reasons of appeal suggest that the Limitation Act is *ultra vires* the Provincial Legislature as regards the plaintiffs. I only refer to this to say that the point was not argued, and calls for no observations.

Title Against Railway Company by Adverse Possession.—See note 43 Am. & Eng. R. Cas. 577; Fisher v. New York, etc., R. Co. (Mass.), 17 *Id.* 80; Fitchburg R. Co. v. Page (Mass.), 7 *Id.* 86; Carolina Central R. Co. v. McCaskill (N. Car.), 25 *Id.* 83; Smith v. New York, etc. R. Co. (Mass.), 25 *Id.* 205; Canada Southern R. Co. v. Lewis (Ont.), 20 *Id.* 196.

Right of Way by Prescription Over Land Acquired by Railroad From State.—In Pennsylvania R. Co. v. Borough of Freeport, 138 Pa. St. 91, the supreme court of Pennsylvania affirmed a judgment of the lower court awarding a preliminary injunction on a bill filed by a railroad company against a borough and its officers, to restrain defendants from interfering with the laying of a second track upon land acquired by the plaintiff company's lessor from the commonwealth, but which had been permissively used as a passage way by the public for more than twenty-one years. The court said: "It would be unreasonable to hold that the mere non-user of a part of a railroad location, side by side with the part in actual continuous use, and embraced in the original grant, would revert to the public simply because the public had enjoyed a permissive, not a hostile, use of this contiguous ground. We think the construction of a track or tracks upon a part of the location throughout its length is the best assertion of right to the entire width that could, in the nature of railroad construction and operation, be demanded. By the side of every railroad track extending throughout the country, beaten paths may everywhere be found daily used and traveled upon by the public, and enjoyed as the easiest and most convenient thoroughfare; for such in reality they become. And yet the thought is never entertained that the public, by the most constant and continuous use of such ground, acquires an indefeasible title to it. The reason is palpable. The presence of the railroad tracks constantly in use is the defiant badge of ownership. It is the only practical assertion of title that can be made. The rule does not differ, because the location of a road is through a more populous district, in this case through a borough, whose citizens have availed themselves of the convenience of using the ground along the railroad track notwithstanding the railroad ties and rails of the company may not have spanned and bound literally with an iron grasp from one side to the other, its authorized domain."

WATSON

v.

CHICAGO, MILWAUKEE & ST. PAUL R. CO.

(Minnesota Supreme Court, June 11, 1891.)

Donation of Land to Railway—Reservation on Town Plat.—On the town plat of the town of Wells was left, undivided into lots, a strip of land on which were the words, "Reserved for right of way, line of S. M. R. R." *Held*, that this was not, under Gen. St. 1878, chap. 29, § 5, a donation of the land to the railroad company. Following Commissioners of Hennepin County *v.* Dayton, 17 Minn. 260.

Dedication of Land to Railway Company.—A common-law dedication of land cannot be made to a railroad company for public use for railroad purposes.

Reformation of Deed—Parties.—A deed conveying real estate cannot be reformed in an action to which the owners are not parties.

Oral Agreement to Convey—Recovery of Real Estate.—An oral agreement to convey real estate, where acts of part performance are not done pursuant to and relying upon it, will not prevent a recovery of the real estate by the owner.

Ejectment against Railroad Company.—An owner upon whose land a railroad company has, without making compensation or acquiring the right in any other way, constructed its railroad, and whether it did so with or without his acquiescence, and whether it did so before or after the passage of Gen. St. 1878, chap. 34, § 33, may bring ejectment to recover the land.

Same—License to Enter—Damages.—Defendant entered upon land by license of the owner, which was revoked by his death, but defendant still retained the possession. *Held*, proper to allow as damages the mesne profits from the time of the death.

APPEAL from District Court, Faribault County.

Andrew C. Dunn, for appellant.

Eller & Haw, for respondent.

GILFILLAN, C. J.—There are two principal questions in the case—*First*. Was there a statutory donation or grant of the land in controversy to the defendant by Clark W. Thompson, by means of the plat of the town of Wells? *Second*. May a railroad corporation acquire an easement in lands by a common-law dedication of it to public use for railroad purposes? For, if the second question be answered in the affirmative, there can be no doubt of the defendant's title, as the facts found are sufficient to establish a dedication.

Questions
presented.

The first of these questions is really covered by the decision in Commissioners of Hennepin County *v.* Dayton, 17 Minn. 260. The statutes (Gen. St. 1878, chap. 29, § 5) pro-

vides that, "when the plat is made out, certified, acknowledged, and recorded as required by this chapter, every donation or grant to the public, or any individual, religious society, or to any corporation or body politic, marked or noted as such on said plat, shall be deemed, in law and equity, a sufficient conveyance to vest the fee-simple of all such parcels of land as therein expressed," etc. Such a donation or grant must be evidenced wholly by the plat. It cannot rest partly upon the plat and partly in parol, any more than can a conveyance by deed. The intent to donate or grant must appear from the plat itself. In the case referred to, there was, upon the plat of the town of Minneapolis, a block not divided into lots, on and across which were placed the words "County Block." The court held the intent to donate to the county not to be sufficiently indicated, and said of those words: "They might furnish ground for a conjecture that the proprietors had either given or granted the block to Hennepin county, or that they had reserved it with the design of giving it to the county at some future time. But there must be more than a ground for any conjecture, even if it were not in the alternative. The donation or grant must be marked or noted as a donation or grant. There must be some marking or note upon the plat, clearly expressing, in some way, that a designated piece of land is given or granted to a designated owner or grantee." So in this case the words marked on the strip of which the land in controversy is a part, "Reserved for right of way, line of S. M. R. R.," might furnish ground for conjecture that the owner had given, or intended in the future to give, the strip to the railroad company; but they do not clearly express that the land is thereby and then donated or granted to the company. If we are to suppose that the owner used words in their legal sense, then the word "reserved" would express an intent on the part of the owner to hold the land to himself, rather than, at present, to part with it. If he intended to withhold the land, it is immaterial, so far as a statutory donation or grant is concerned, what purpose he intended eventually to make of it.

It is remarkable that there are so few decisions touching in any way the capacity of a railroad company to receive a common-law dedication of land for the purpose of a railway. The appellant refers us to 1 Ror. R. R. p. 322, where the author assumes that such dedication may be made, and to *Daniels v. Chicago & N. W. R. Co.*, 35 Iowa, 130; *Texas & New Orleans R. Co. v. Sutor*, 56 Tex. 496, 11 Am. & Eng. R. Cas. 506; and *Morgan v. Chicago & A. R. Co.*, 96 U. S. 716,—in which the

Donation by
means of plat.

Capacity of
railroad to re-
ceive dedica-
tion of land.

same thing seems to have been assumed, though in none of them is there anything to indicate that the question was raised. In *Todd v. Pittsburg, Ft. W. & C. R. Co.*, 19 Ohio St. 514, referred to by the respondent, the court held directly that a railroad company cannot acquire title to land by dedication.

The appellant argues that, whenever the right of eminent domain may be exercised to appropriate private property to public use, the property, or an easement in it, may pass by common-law dedication; and therefore, as lands for the use of a railroad company may be appropriated under the right of eminent domain, such a dedication may be made to a railroad company. It is not true, however, that a public use, which will justify taking private property under the right of eminent domain, will in all cases sustain a dedication to public use. Private property may, under the right of eminent domain, be appropriated for mill-dams, (*Miller v. Troost*, 14 Minn. 365;) for the maintenance and operation of booms on rivers navigable for logs, (*Cotton v. Mississippi & Rum River Boom Co*, 22 Minn. 372;) for constructing waterworks for a particular town, (*Inhabitants of Wayland v. Middlesex*, 4 Gray, 500;) for a district school, (*Williams v. School-Dist.*, 33 Vt. 271; *Board of Education of Tp. 44 v. Hackmann*, 48 Mo. 243;) and undoubtedly for many such purposes, as for fire-engine houses in cities and towns. But it would be extending the doctrine of dedication beyond anything yet suggested in the books to hold that the title or right to the property or easement could thereby pass to and vest in the owner of the dam or mill, the boom company, the town constructing the waterworks of engine house, or school district erecting the schoolhouse. The rule that a right in the public to use the land of an individual may be vested by dedication, by acts *in pais*, when such a right can vest in an individual only by grant, is anomalous, and grows out of the necessity of the case, and has been accounted for on the ground that there is no grantee *in esse* capable of taking. The origin of the doctrine of dedication has sometimes been ascribed to *Lade v. Shepherd*, 2 Strange, 1004, decided about 150 years ago. That is the earliest case in which we find the word "dedication" used, and in which some of the requisites of a dedication are suggested. But, though it has been greatly developed and modified since that time, to meet the altered conditions of public needs; the doctrine had its roots in the common law for centuries before that case. The public right, however, was not described as held by dedication, but by custom. As to the rights of the public, some requisites of a good custom are not retained in the law of

dedication, most notably that in relation to the time or duration of the public uses. Others are, a custom to take a profit out of the land of another to use it for purposes of profit was not good. *Gateward's Case*, 6 Coke, 60; *Grimstead v. Marlowe*, 4 Term. R. 717; *Mellor v. Spateman*, 1 Saund. 341; *Blewett v. Tregonning*, 3 Adol. & E. 554; *Waters v. Lilley*, 4 Pick. 145; *Pearsall v. Post*, 20 Wend. 111, 22 Wend. 425; *Littlefield v. Maxwell*, 31 Me. 134. All that could be claimed was an easement; as, a right of way. The claim of right to take a profit from the soil of another had to be supported by grant or by prescription, which supposes a grant; and as the public, as such, could not take a grant, of course it could not have such a right. We have not been referred to any case, nor been able to find any, which decides that the law of dedication is not subject to this restriction, or which holds that a dedication may be made to take a profit out of the land, or to use it for purposes of profit. The case of *Pearsall v. Post*, especially, in the court of errors, goes over the whole doctrine, and denies that such a right can be claimed by dedication. Most of the land throughout the country, appropriated under the right of eminent domain, is taken and employed in the public use, through the agency of business corporations. They are authorized to employ the land taken, not only for the public benefit, in the public use, but for carrying on the business they are authorized to transact, not only to serve the public, but to serve their own private interests,—to make for themselves a profit out of the use of the land taken. Where land is to be employed in the public use, by a business corporation or an individual there is no reason, founded on necessity, for the doctrine of dedication; because there is, in such case, a grantee *in esse* capable of taking a grant.

Private property cannot be acquired by dedication. It is argued that a railway company is a public or *quasi* public corporation; that its purposes and duties are public; that its use of land, held and used by it for the purpose of its railroad, is a public use; and that lands dedicated for that purpose are dedicated to the public for public use. From the arguments used it might be inferred that the title of such a company to the lands held by it is merely nominal, held by an agent for its principal, no rights or interests of its own being involved. Fortunately for such corporations, and for the public also, this is not the view the courts take of the relation between the corporation and the property held by it. The lands acquired by the corporation, for the purposes of its enterprise, are, so far as the right of property is concerned, private property. If purchased, the corporation pays for

them; if taken in the exercise of the right of eminent domain, it pays the compensation. It is true they are charged with a public duty, which the corporation, in consideration of the rights and powers conferred on it by the state, assumes to perform, and which the state can compel it to perform. But its rights in the lands as its own property are secure and inviolable. *State v. Chicago, M. & St. Paul R. Co.*, 36 Minn. 402. The corporation for its own profit and advantage, accepts the franchises offered by the state, and assumes to perform the functions and duties required by the state, not with property furnished it by the state, but with its own property. The ownership of the property is private, though the use required to be made of it is public. The private ownership prevents the acquisition of it by dedication.

There are several minor questions made by appellant:

First. The deed of Clark W. Thompson, which was intended to, but through mistake and inadvertence did not, convey to defendant the land in controversy, ought to be reformed. There is this sufficient reason why

Reformation
of deed.

it cannot be in this action: The necessary parties are not before the court. The owners of the land, the heirs or devisees of Thompson, are not parties. *Second.* The agree-

ment by Thompson to grant a right of way to the corporation cannot, after a location of the railroad pursuant to it, be regarded as a mere license revocable by the licensor. The findings of fact do not come

Agreement as
a license—
Revocation.

up to the requirements of this proposition; for the finding as to the agreement is not that Thompson would convey the land in controversy, nor that he would convey the strip 130 feet wide, of which such land is a part, nor any specified width, but that he would convey a strip sufficient for the right of way of the railroad and its structures and appliances. He did convey a strip 100 feet wide; and there is no finding that the company located its line pursuant to the agreement.

The finding is: "But it does not appear from the evidence that the Southern Minnesota Railroad Company constructed its railroad on the premises in question because of or relying on such promise." This is a very common, though not a commendable, mode of stating a finding against an allegation of fact. Such a finding must be taken as a finding against the party having the affirmative of the issue to which it refers. It is claimed by appellant that, when an

owner of land has consented to the occupation thereof by a railroad with its tracks and appliances, he cannot afterwards maintain ejectment for the land, especially where, as in this case, the entry and possession antedate (chapter 98, Laws 1875, Gen. St.

Right of land-
owner to
maintain
ejectment.

chap. 34, § 33;), where the corporation has not acquired the fee of or an easement in the land, a right to retain possession of it, either by grant from the owner, or in the manner prescribed by its charter or the statute. Where the owner has not, in some legal way, lost his right to the possession, he is, of course, entitled to some remedy. As against a private individual, entering, merely, by license, and withholding the possession, the obvious remedy would be by ejectment. It is difficult to see why, even in the absence of a statute on the subject, he should be deprived of that remedy, because the one in possession without right is a railroad corporation, unless, because of the public interest requiring that the line of railroad shall be continued, and not broken by the owner of a piece of land ejecting the company, public policy required the remedy by ejectment to be denied. Without considering whether the decisions denying the remedy on that proposition are sound, it is enough to say that the legislature is the guardian of the public interests, and that it manifestly considered the public interest sufficiently provided for, by allowing a railroad company sued in ejectment for land, across which it has constructed its road, to turn the action into a proceeding to acquire, under the right of eminent domain, the land or an easement therein. Gen. St. 1878, chap. 34, §§ 33-38, inclusive. We think that statute applicable whether the railroad company went into possession before or after its passage, and by its terms it permits the action whether the company took possession with or without the owner's acquiescence, provided it has not made compensation therefor. The exemption from the remedy by ejectment, if such exemption existed, was not a vested right in the corporation. It was not because of any property right in it, but because of what was supposed to be the public interest; and when the legislature, as it did, by the act referred to, determine that the public interest no longer requires the exemption to exist, it ceases. The act applied to all future actions. The allowance as damages of the mesne profits, from the revocation by the death of Thompson of his license to the company to enter upon and possess the land, was correct. There are no facts found making it appear that after his death the license was renewed or continued by his representatives. Judgment affirmed.

Dedication of Land to Railroad Company for Public Use.—See *Texas & N. O. R. Co. v. Sutor* (Tex.), 11 Am. & Eng. R. Cas. 506; *Daly v. Georgia, etc., R. Co.* (Ga.), 36 *Id.* 20; *Pennsylvania R. Co. v. Ayres* (N. J.), 36 *Id.* 1; *Ottawa, etc., R. Co. v. Larson* (Kan.), 36 *Id.* 163.

AYRES

v.

PENNSYLVANIA R. Co.

(52 New Jersey Law, 405.)

Dedication—Reservation of Part of Highway for Railroad.—A dedication of land for public use as a highway may be made subject to a right to devote a part thereof to use for railroad purposes, and when such portion has been thus devoted, the use as a way will be suspended, and remain suspended so long as that part is used for railroad purposes.

Conveyance of Land Abutting on Such a Highway prior to the designation of a part for railroad purposes will pass the grantor's title to the center of the street, subject to the public easement and the reserved right to devote to use for railroad purposes.

Same—Power and Intention of Owner to Dedicate.—The fact that the railroad company, which accepted from the owner a grant of a part of such land and devoted it to railroad use, after acts from which such a dedication of the whole would be inferred, had filed a survey of its route over the same land prior to the dedication, and that its charter prescribed that it should become seised in fee of lands taken by condemnation, did not deprive the owner of the power, or indicate his intent not to thus dedicate, for the company could take less than a fee by purchase, and the perpetual and paramount right to use for railroad purposes thus acquired is not inconsistent with such dedication.

MCGILL, Ch. and BEASLEY, C. J., dissenting.

ERROR to Supreme Court.

Argued before MCGILL, CH., BEASLEY, C. J., DIXON, GARRISON, REED, and MAGIE, Justices, and CLEMENT, BROWN, COLE, and Smith, J.J.

Mr. Vail, for plaintiff in error.

B. Gummere, for defendant in error.

MAGIE, J.—This writ of error brings up a judgment in favor of the Pennsylvania Railroad Company, which is the defendant in error, against Janet L. Ayres, who is the plaintiff in error, rendered in an action of ejectment brought by her to recover possession of a strip of land 120 feet long by 7½ feet wide, lying within the lines of a public highway in Rahway, and occupied by a track of the railroad company. The cause was tried without a jury, in the Union county circuit court, (Justice VAN SYCKEL,) and the following facts appeared: On June 4, 1835, Louis B. Brown acquired title to a tract of land in Rahway. He laid out streets thereon, and divided it into 291 building lots, and on November 4, 1835, filed in the county clerk's office a map showing the streets and lots. One of the streets was deline-

Case stated.

ated and marked as being 100 feet in width, and its name "Railroad Avenue," was printed in the center of it. Along the center ran parallel lines, and at one place were the words "Railroad Depot." On October 22, 1835, the New Jersey Railroad & Transportation Company, incorporated by act of the legislature of March 7, 1832, Laws 1832, p. 96) filed in the office of the secretary of state a survey of the center line of its road, which line over the Brown tract coincided with the center line of Railroad avenue. That company had previously constructed its railroad to a point near the east line of the Brown tract, and before August, 1836, had entered on Railroad avenue in prosecuting the extension of the railroad westerly. On November, 1835, Brown made his first deed of lots, and between the filing of his map and May 30, 1837, had made and delivered some 30 deeds for lots upon his tract, and designated by reference to his map. Plaintiff's title was acquired under some of those to whom Brown conveyed such lots during that period. Her deeds convey to her lots fronting on Railroad avenue, and opposite to the land in question. By deed dated May 30, 1837, Brown conveyed to the New Jersey Railroad & Transportation Company a strip of land in the middle of Railroad avenue, and extending for a width of 16½ feet on each side of the center line. Defendant has the rights acquired by that deed. The land in question is not within the strip conveyed by the last mentioned deed, but adjoins it, and lies between it and lots of the plaintiff. It does not, however, extend beyond a line drawn midway between the strip conveyed by that deed and the side of the avenue as originally laid out. Plaintiff's deeds describe the lots conveyed as bounding on the avenue, but there were no words therein including the land within the avenue; and the contention was that by an established construction she acquired thereby title to land under the avenue, including the land in question, subject only to its use as a public highway. Upon these facts the learned justice who tried the cause found that plaintiff had no title to the land in question, and the judgment now under review was rendered on that finding.

The facts before the court below were substantially the same as those which were considered in the supreme court in *Ayres v. Pennsylvania R. Co.*, 48 N. J. Law, 44, and by this court in 50 N. J. Law, 660, 36 Am & Eng. R. Cas. 1. The only difference is that in the case now in hand it was made to appear that the survey of the railroad route was filed before Brown had filed his map, or made any deed of lots delineated thereon. That fact was deemed by the court below to distinguish this from the case above cited, and to require a different result from

Former decisions on same facts

that reached in that case by a divided court. In the case above cited, a majority of the supreme court, upon the facts then appearing, held that by Brown's acts a single street of 100 feet in width was dedicated to be used as a public highway, subject to the devotion of a part of it for use for railroad purposes; and that when Brown conveyed to the railroad company he designated the part which was to be thus used. It was also held that Brown's deeds for lots fronting on Railroad avenue, made before his conveyance to the railroad company, passed his title to the center of the avenue, subject however, (1) to the use for railroad purposes of such part as should be designated; and (2) to the use of the whole as a highway; the former use being paramount to the latter so long as the designated portion was used for railroad purposes.

From the facts appearing in the case before us, it was held by the court below that the previous filing of the railroad survey forbade the inference of such a dedication as the supreme court deemed to have been made, and this was put on the ground that the railroad company, by their charter, had a right to acquire, not a mere easement, but a title in fee-simple. From this added circumstance it was decided that Brown dedicated two roadways, one on each side of the strip conveyed to the railroad company, and that Brown's grantees of lots fronting on the avenue and the railroad company as grantee of the centre strip, severally acquired title to the center of each of these roadways, subject to the public easement. Upon this construction plaintiff's title does not extend over the land in question.

Decision of
court below.

The argument here in support of the conclusion below maintains (1) that after the filing of the railroad survey Brown had no power to dedicate the whole 100 feet in width as a public highway; and (2) that such filing and the attendant circumstances repel the inference of an intent to thus dedicate the whole width of Railroad avenue.

With respect to the first point thus made, it may be remarked that it is well settled in this state that the filing of such a survey confers on a railroad company no title whatever. It has been held in the court of chancery not even to be notice to subsequent purchasers. *Central R. Co. of N. J. v. Hetfield*, 18 N. J. Eq. 323. In this court, the right of a subsequent purchaser to maintain an action of trespass against a railroad company occupying lands within such survey was established. *Hetfield v. Central R. Co. of N. J.*, 29 N. J. Law, 571. What a railroad company acquires by a survey filed is only the right to

Effect of
filing survey.

acquire title within its bounds by purchase or condemnation. The survey in this case indicated only the center line of the route in courses and distances. By its charter the company could acquire 66 feet in width. What width it should take over the Brown tract was not fixed by the survey. It could only be fixed by the agreement of the owner or condemnation proceedings. *Hetfield v. Central R. Co. of N. J.*, *ubi supra*. It was fixed by the acceptance of a deed for a width of 33 feet only. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law, 205; *Childs v. Central R. Co. of N. J.*, 33 N. J. Law, 323. In that width the railroad company acquired what right its grantor had. At the time its deed was accepted it must be

Dedication of
street for
railroad.

conceded that Brown, its grantor, had done acts raising a conclusive presumption of the dedication of the whole of Railroad avenue, except so far as the dedication was controlled and limited by the indications on the map that part of that avenue was to be used for a railroad. Now, while it is true that the charter of the New Jersey Railroad & Transportation Company provides that, upon condemnation, the company becomes seised and possessed in fee-simple of the lands condemned, yet condemnation was only to be resorted to when the lands had not been donated to the company or purchased by it at an agreed price. So it is obvious that the company could, if it chose, acquire by purchase just so much estate as was requisite for its purposes, and was not bound to purchase more. Besides, it is prescribed by a proviso to that section that, on an abandonment or cessor of use for a certain period, lands acquired by the company, whether "by concession or by inquisition," shall revert in the person from whom the lands were taken, his heirs and assigns; so that if the 33-foot strip, this Railroad avenue, had been taken by condemnation, I think there would be no insuperable difficulty in holding that the company acquired a fee, but on abandonment or cessor of use the prior dedication would attach. But that strip was acquired by purchase; and, Brown's prior dedication being recognized, it is plain that the company acquired everything necessary for its purposes, for his dedication was *cum onere*, and the use as a public highway was subsidiary to the railroad use. The railroad company obtained by Brown's deed a perpetual right to use the strip granted for its purposes, with which use the dedication as a highway did not interfere. It will not operate on the land so granted until the railroad use is abandoned. Any other construction will, it seems to me, lead to the conclusion that, on the abandonment of the railroad, Brown or his heirs may rightly inclose or build upon the strip of 33 feet width in the center of this avenue, which

plainly was never intended. Such a dedication may well be accepted by the public. As the railroad right is admittedly paramount to the easement as a highway, the acceptance would not at all derogate from the public grant to the railroad company.

What has been already said partially indicates my view of the second point pressed in argument. The presumption of the dedication of Railroad avenue as a single street of 100 feet in width was before deemed to arise on the facts that Brown sold lots fronting thereon, and had delineated it on his map as a single street, with a single name, with a uniform and designated width, which extended over and included the portion which was indicated as intended for railroad use. In my judgment that presumption is not repelled by the circumstance that the railroad company could then have acquired by condemnation a fee-simple. Had it taken its land by condemnation, I think Brown might well be deemed to have impressed on such interest as might afterwards revest in him a dedication to public use as a highway. In granting that land to the company after dedication, there is, of course, nothing to detract from the inference to be drawn from his previous acts. The company, by accepting the grant, elected to take what Brown could give, and his grant was consistent with a previous intent to dedicate. The suggestion that the railroad use of 33 feet is incompatible with the use thereof as a highway, and therefore that it may be inferred that Brown did not intend to create the latter use by dedication, is not apposite. In 1835 that incompatibility does not seem to have been recognized. By the charter in question the railroad company was authorized to acquire the turnpikes on its route, and it is well known that its railroad was constructed and is now maintained on such turnpikes, which were used for many years by the side of the tracks. But in the view of the case I have taken the railroad use is admitted to be paramount and exclusive of the other use so long as it continues. The case in hand is not, in my judgment, distinguishable from the case previously decided in respect to the dedication.

It only remains to consider the effect of the previous filing of the railroad survey upon the construction of the deed under which plaintiff holds, and which bound her property on the side of Railroad avenue. By the doctrine established by this court in *Salter v. Jonas*, 39 N. J. Law, 469, such deeds are to be construed as embracing in their description all lands of the grantor within the lines of the street, between the property and the center line of the street, unless there are express

Presumption
of dedication
not repelled.

Effect of
previous
filing of
survey.

words excluding such construction, or peculiar circumstances indicating a contrary intent. These deeds contain no words of exclusion. The map, which was one of Brown's acts from which dedication is inferred, showed an intent to devote part of the avenue to railroad uses. Therefore it must be inferred that he intended to retain what power was necessary to affect that purpose. But, as we have seen, it was not necessary that he should have the fee-simple title. It was sufficient that he should retain the right to devote to railroad uses such width as he and the railroad company should agree upon. If the company desired more, it could have resorted to condemnation. The circumstances do not therefore indicate an intent to retain what was unnecessary, or to deprive his grantees of abutting lots of what was necessary to their protection. There is therefore nothing to prevent the application of the doctrines of *Jonas v. Salter* to this case.

The result is that upon the facts plaintiff established her title to the land in question, and was entitled to a finding in her favor against defendant, which had encroached thereon with its track. The judgment should be reversed with costs, and a *venire de novo* should follow.

Dedication of Land for Railroad—Reservation in Plat.—See *ante* *Watson v. Chicago, M. & St. P. R. Co.*, and note pp. 543, 548.

LEROY & CANEY VALLEY AIR-LINE R. CO. *et al.*

v.

SMALL.

(*Kansas Supreme Court, May 9, 1891.*)

Right of Way Procured by Contractors—Failure of Company to Fulfill Contract.—Where a railroad company authorizes its contractors employed by it to construct its railroad to procure the right of way for it, which they are to do at their own expense, and the contractors, through their agent, in the name of the railroad company, procure a right of way through the plaintiff's premises by contract, and afterwards, by reason of such contract, procure only nominal damages to be assessed by the condemnation commissioners for such right of way, and this assessment of damages is all done without the knowledge or consent of the owner, and the railroad is constructed by the contractors, and afterwards operated by the railroad company, but it fails to fulfill the contract, *held*, that the owner may recover substantial damages from the railroad company, if it elects to retain the right of way.

ERROR from District Court, Wilson County.

J. H. Richards and *C. S. Reed*, for plaintiff in error.

S. S. Kirkpatrick, for defendant in error.

VALENTINE, J.—This was an action brought in the district court of Wilson county by O. V. Small against the Leroy & Caney Valley Air-Line Railroad Company and the Missouri Pacific Railway Company, in which the plaintiff alleged, among other things, that the defendants had constructed their railroad across his land under a contract; that they had not fulfilled their contract, but had committed a breach thereof; that they had procured condemnation proceedings to be instituted and carried on to consummation without his knowledge, in which he was allowed only nominal damages; that he had received no compensation for his losses; and asked that the condemnation proceedings be set aside, and for general relief. The case was tried before the court without a jury, and judgment was rendered in favor of the plaintiff, and against the defendants, that they should pay him the sum of \$1,200 within 60 days, or relinquish their right of way; or, if they should do neither, then that the plaintiff should recover of and from the defendants the sum of \$1,200; and the defendants, as plaintiffs in error, bring the case to this court for review. Case stated. It appears from the pleadings and the evidence, among other things, that the Leroy & Caney Valley Air-Line Railroad Company was organized in 1885 for the purpose of constructing a line of railroad from a certain point in Wilson county to Elgin, in Chautauqua county. The company was composed entirely of persons living along the line of the proposed railroad. Some time afterwards a committee was sent by the company to New York city, which, in pursuance of their authority, succeeded in procuring the Missouri Pacific Railway Company and one Warren H. Loss to enter into a written contract with this new company for the purpose of constructing this new line of railroad. By the terms of the contract, Loss was the contractor to construct the railroad, and was also to procure the right of way for the railroad companies, at his own expense. Afterwards he assigned all his rights and interests under the contract to Simmons & Sidell, a partnership firm composed of James A. Simmons and Cornelius V. Sidell, who afterwards constructed the railroad under the contract. Prior, however, to their construction of the railroad, they employed Isaac Hudson to procure the right of way through Wilson county. Commissioners were also appointed to procure the right of way through that county by virtue of condemnation proceedings. Hudson afterwards, for the contractors and the railroad companies, entered into the contract sued on, which was and is a contract with the plaintiff, Small, and his wife for a right of way through Small's premises. Upon the face of this contract, Small and wife were the parties of the first part, and

the Leroy & Caney Valley Air-Line Railroad Company was the party of the second part, and the right of way was procured for such railroad company. The contract, however, was not signed by either of the railroad companies, nor by Hudson, nor by the contractors, but only by Small and wife. The commissioners appointed to procure the right of way were instructed by Hudson, on account of said contract with Small and wife, to assess only nominal damages for the right of way through Small's land, and through other lands where similar contracts had been entered into between Hudson and the owners of the lands; and the commissioners in fact assessed only nominal damages for the right of way through Small's land, to wit, \$1 for one quarter section of land, \$1 for a half quarter section of land and \$80 for another half quarter section of land, and nothing for the remainder. Small had no knowledge of this assessment until after it was too late to take an appeal, and therefore never took an appeal. The railroad was afterwards constructed by the contractors, and is now operated by the railroad companies. The Leroy & Caney Valley Air-Line Railroad Company was and is the nominal owner thereof, but the Missouri Pacific Railway Company was and is the real owner thereof.

The first alleged error is the ruling of the court below, refusing to strike from the files the plaintiff's amended petition.

Amendment of pleading. This amended petition had been filed upon leave of the court previously given, but it is claimed that it is a departure from the original petition. It is not such a departure, however, from the original petition as to make it objectionable; besides, the allowing of amendments to pleadings by the trial court is very largely within its discretion, and so much so that it is very seldom that a reviewing court can say that error has been committed in such cases. The reviewing court cannot do so unless it can say that the trial court has abused its discretion. We cannot say so in this case.

There are various other complaints made concerning the various rulings of the court below, but they do not require any separate or special consideration. Grouping the most of them together, we think they amount substantially to this: It is claimed that, as the contract with Small and wife for the right of way through his premises was not signed by either of the railroad companies, nor filed for record in the office of the register of deeds, nor made by any direct agent of either of the railroad companies, but only by an agent of the contractors, it cannot affect any of their rights or interests in the least. It was alleged, however, in the plaintiff's petition that the contract

**Right of way
procured by
contract.**

was executed between the plaintiff, Small, and the Leroy & Caney Valley Air-Line Railroad Company, and this allegation was not denied by any one under oath, and therefore it must be taken as true. Civil Code, § 108. Besides, the argument proves too much; for if Hudson and the contractors had no authority to procure the right of way for the railroad companies by any direct contract with the owner of the land through which the railroad was constructed, then Hudson and the contractors would have no authority to procure the right of way in any other manner for the railroad companies; and as the whole of the right of way through Small's land, and through all the other lands in Wilson county, was procured only through the intervention of Hudson and the contractors, the railroad companies would not have and have not any right of way through the plaintiff's (Small's) lands, or through any other person's lands. The evidence shows that Hudson and the contractors did everything in procuring the right of way, that procured by virtue of condemnation proceedings as well as that procured by contract. The contractors and Hudson were really the agents of the railroad companies to procure the right of way, and the railroad companies are bound by their agents' acts. And, if they are so bound—that is, if they are bound by the acts of the contractors and Hudson in procuring their right of way,—then the judgment of the court below is correct. But, if they are not so bound, still the judgment is correct; for, if they are not bound, then they can take no benefits from the acts of Hudson and the contractors in procuring the right of way for the railroad companies, and in that event they have obtained no right of way through the plaintiff's (Small's) premises, neither by contract nor by condemnation proceedings; and as they have actually constructed their railroad through such premises, and are now operating the same, they are still liable for the resulting damages, and this makes the judgment of the court below correct. We think it is correct upon the view that the railroad companies are bound by the acts of Hudson and the contractors. It cannot be possible that a railroad company, with its contractors and their agent, can, by the methods resorted to in the present case, procure a right of way through a man's land for nothing. Such is not the constitutional or statutory mode of procuring a right of way, and we do not think that it can be upheld. We do not think that there is anything further in this case that requires consideration or comment. The judgment of the court below will be affirmed. All the justices concurring.

PENNSYLVANIA CO.

v.

PLATT *et al.**(Ohio Supreme Court, May 20, 1890.)*

Abandonment of Right of Way—Rights of Land Owner—Recovery of Damages.—In the decision of this case on the demurrer, reported in 43 Ohio St. 228, 22 Am. & Eng. R. Cas. 129, it was *held* that, upon the averments of the petition, the plaintiffs might treat the easement of the Lake Shore & Michigan Southern Railway Company in that part of its right of way described in the contract between that company and the defendant, set forth in the petition, as abandoned, and recover of the defendant damages as upon an appropriation. The fact upon which the petition based the alleged abandonment was the making of the contract alluded to, by which the Lake Shore Company undertook to transfer that part of its right of way therein described to the defendant for railroad purposes in perpetuity. The averments of the petition relating to the abandonment are that "by the agreement between the two companies, the Lake Shore & Michigan Southern Railway Company, for the consideration" therein named, "abandoned to the defendant, and undertook to permit and license the defendant to use and perpetually occupy for its railroad" that part of the former company's right of way referred to; and, "that, by the abandonment aforesaid," the easement of the Lake Shore & Michigan Southern Railway Company ceased and terminated;" and "that portion of said lot so abandoned to and occupied by the defendant is of the value of ten thousand dollars." The answer does not controvert the making of the contract between the two companies as alleged in the petition, but denies "that the Lake Shore Company intended to or did thereby abandon any of its right of way," or "that its easements or right of way ceased and determined by virtue of said agreement." *Held (a)* These denials raise no issue of fact. They are the pleader's construction of the contract, and his opinion as to its legal effect. *(b)* By the former decision of this court, upon the demurrer, it was settled that the effect of the contract made between the Lake Shore Company and the defendant was to work the abandonment claimed in the petition; and it was not error for the court, on the trial of the case, to so instruct the jury.

In Order to Estop an Owner from Asserting Title to His Property, by his declarations or conduct, it must appear that he was at the time apprised of the true state of his title; that he knew, or had reason to believe, his declarations or conduct would be acted upon by another; that they were acted upon by such other person in ignorance of the title; and that such person will be injured by allowing the truth of the admission by the declaration or conduct so acted upon by him to be disproved.

Construction of Railroad—Estoppel of Land Owners—Right to Claim Compensation.—While an owner who stands by, and, without objection, sees a public railroad constructed on his land will, after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, be estopped from reclaiming the land, or enjoining its use by the railroad company, he is not thereby estopped from claiming compensation for its value.

ON the 14th of July, 1876, the defendants in error, Harvey P. Platt and Charles H. Scribner, commenced an action against the Pennsylvania Company in the court of common pleas of Lucas county, by filing therein the following petition: "The plaintiffs, Harvey P. Platt and Charles H. Scribner, say that the defendant, the Pennsylvania Company, at the times hereinafter mentioned, was, and still is, a railroad corporation, created and organized under the laws of the state of Pennsylvania, and, during the period hereinafter mentioned, has been doing business in Ohio, and managing and operating a line of railway partly located in said county of Lucas, under and by virtue of the laws of the state of Ohio; but said defendant does not now have, nor has it ever had, power under the laws of Ohio to appropriate lands for railroad purposes. Plaintiffs further say that, in the year 1851, one William Oliver was, and for some time prior thereto had been, the owner in fee-simple of the following described lands, to-wit; Lot thirteen (13) in the subdivision of fractional sections one and twelve, town ten south, range seven east, and of river tracts eighty-six (86) and eighty-seven (87), in the twelve-mile reserve at the foot of the rapids of the Miami of Lake Erie, Lucas county, Ohio. That while the said Oliver was the owner of said lot as aforesaid, and on the 28th day of February, A. D. 1851, the Toledo, Norwalk & Cleveland Railway Company, a corporation created under and by virtue of the laws of Ohio, for the purpose of constructing and operating a line of railway in said state, instituted proceedings in the court of common pleas of said county to appropriate and condemn, for its uses as such railroad corporation, a portion of said lot thirteen. Such action was had therein that a portion of said lot, being a strip of land one hundred feet in width, and about twelve hundred feet in length, extending entirely across said lot on the westerly side thereof, was appropriated by said last mentioned railroad company for its uses aforesaid; but no compensation for said lands so appropriated was awarded or paid to said owner thereof. That shortly after said appropriation, and in virtue thereof, the said Toledo, Norwalk & Cleveland Railway Company constructed along and upon the westerly fifty feet of said strip of ground a railroad track, and continued thereafter to run their cars over the same until said company was merged by consolidation, under the statutes of Ohio, into the Lake Shore & Michigan Southern Railway Company, which last mentioned company became the successor, and was and is vested with the rights, property, and franchises of the said the Toledo, Norwalk & Cleveland Railway Company, and has since continued to run its cars over

said track so constructed along and upon the westerly fifty feet of said strip of land appropriated as aforesaid; but neither the said the Toledo, Norwalk & Cleveland Railway Company nor the said the Lake Shore & Michigan Southern Railway Company has ever made use of any portion of said strip of land lying east of the center line thereof; nor has either of said railroad companies ever had any interest in said lands, except as acquired by said appropriation. Plaintiffs further say that after the said appropriation, the said William Oliver departed this life intestate, seised in fee of said lot thirteen, leaving one Harriet O. Hall, his only child and heir at law, who thereupon became and was seised in fee of said lot, subject, only, to the rights acquired by said railroad company under and by virtue of said proceedings to appropriate. And being so seised in fee, the said Harriet O. Hall, on the 25th day of September, A. D. 1869, by her deed of that date duly executed, acknowledged, and delivered, conveyed to these plaintiffs all of said lot thirteen, including said strip of ground one hundred feet in width, subject, however, to the rights acquired therein by said railway company as aforesaid; but excepting a portion of said lot off the southerly end thereof, and easterly of the center of the 'River Road,' so-called, containing five and 5612-10000 acres, which had been before that time conveyed to one Stillman Brown. And plaintiffs say that under and by virtue of said conveyance they therefore became and have ever since been vested with the full title and estate in and to said premises, in their own right and in trust, and they thereupon entered upon and have ever since been possessed thereof, subject only to the rights of said railroad company acquired as aforesaid. Plaintiffs further say that about the month of September, A. D. 1872, or shortly thereafter, the defendant, the said Pennsylvania Company, wrongfully and unlawfully, under a pretended license, obtained from the said Lake Shore & Michigan Southern Railway Company, entered upon so much of said strip of ground one hundred feet in width, appropriated as aforesaid, as lies easterly of the center line thereof, and proceeded to and did dig and excavate the same along and upon said lot for the entire length thereof, and proceeded to and did lay down and construct thereon a railway track, and have ever since been and now are engaged in running their passenger and freight trains of cars daily, and many times each day, along and over the same; that on the 4th day of January, A. D. 1874, the said Pennsylvania Company entered into a contract in writing with the said the Lake Shore & Michigan Southern Railway Company, a copy of which is hereto attached, marked 'A,' and

made a part of this petition, whereby it was agreed, among other things, between said companies that for the consideration of \$7,500, to be paid by defendant to said the Lake Shore & Michigan Southern Railway Company, and upon certain other considerations in said agreement mentioned, the said last-mentioned company abandoned to the defendant, and undertook to permit and license the defendant to use and perpetually occupy for its said railroad a strip twenty-five feet in width, part of said strip of one hundred feet in width, lying east of and adjoining the center line of said last-mentioned strip, along the entire length thereof; and also assumed, for the consideration aforesaid, to grant to defendant certain other rights and privileges in the lands and easements of said the Lake Shore & Michigan Southern Railway Company. The portion of said lot so abandoned by said last-mentioned company to the defendant is shown in the plat or diagram attached to, and forming part of, said Exhibit A, and made a part of this petition. And plaintiffs say that the defendant claims, under and by virtue of said contract with said the Lake Shore & Michigan Southern Railway Company, to have acquired the right to use and occupy said strip of ground for its said railroad purposes, during its will and pleasure. And plaintiffs aver that by the abandonment as aforesaid of the easterly fifty feet of said strip of ground by the said the Lake Shore & Michigan Southern Railway Company, and of the portion thereof occupied by defendant as aforesaid, the said easement therein of the said last-mentioned company acquired by said appropriation thereof has ceased and terminated; that defendant has acquired no right in and to any portion of said lot under said contract with said company, or otherwise, and all its said acts are in violation of the rights of plaintiffs as the said owners of said premises. And plaintiffs aver that that portion of said lot so abandoned to and occupied by defendants, as aforesaid, is of the value of ten thousand dollars. Plaintiffs further say that said lot thirteen extends, on the west, to the thread of the channel of the Maumee river, and embraces the easterly shore of said Maumee river for a distance of about twelve hundred feet; that, as the owners of that portion of said lot thirteen conveyed to them as aforesaid, they are invested with the title to and ownership of said river front extending to the thread of the channel of said river as aforesaid, and all the rights and privileges connected therewith and attaching thereto; and, but for the said wrongful and unlawful acts of the defendant hereinbefore complained of, the said property, rights, and privileges of the plaintiffs would be of great value. Plaintiffs say that the

said excavations made by the defendant, as aforesaid, are of great depth, and extend entirely across the said lot thirteen, at the westerly side of the 'River Road,' so-called, and are within a short distance of said river front of the plaintiffs for said distance of about twelve hundred feet; that said railroad track of defendant is constructed upon, and operated along, that portion of said lot so excavated as aforesaid, at a different grade from that of the tracks of said the Lake Shore & Michigan Southern Railway Company, and by reason of the premises aforesaid all communication between said river front and the remainder of plaintiffs' said premises is cut off and destroyed; that in consequence of said wrongful and unlawful acts of the defendant, and of the proposed maintenance thereon of defendant's said line of railway as aforesaid, the usefulness and value of plaintiffs' said river front, and of the remainder of their said premises have been and are greatly injured and impaired and depreciated. And plaintiffs aver that they have sustained damages by reason of the premises aforesaid in the sum of fifty thousand dollars. Wherefore plaintiffs pray judgment against the defendant for the sum of sixty thousand dollars; and for all other proper relief." A general demurrer to the petition having been sustained, the case was brought on error to this court, where it was held that the petition stated a cause of action, and the judgments below were reversed, and the cause remanded for further proceedings. The decision of the court is reported in 43 Ohio St. 228, 22 Am. & Eng. R. Cas. 129.

A copy of the contract between the Lake Shore & Michigan Southern Railway Company and the Pennsylvania Company, referred to in the petition as "Exhibit A," is contained in the statement of the case there made, and need not be again set out here. After the case was remanded to the court of common pleas, the defendant filed the following answer:

"And now comes the defendant, and by leave of court files its amended answer to plaintiffs' petition, and says it admits that it is a corporation of the state of Pennsylvania, and has been doing business in Ohio, operating the line of railway named in plaintiffs' petition. It admits that William Oliver was the owner of the premises described in plaintiffs' petition, in the year 1851, and that the Toledo, Norwalk & Cleveland Railway Company, a corporation created under and by virtue of the laws of Ohio, duly appropriated and condemned for the use of its line of railway, a portion of the lot of said Oliver extending entirely across said lot, and 100 feet in width as averred in said petition; but it denies the averment in said petition that said Oliver was not compensated and paid for said lands so appropriated by said railway corporation. It

admits that said the Toledo, Norwalk & Cleveland Railway Company afterwards constructed a line of railway upon said tract, and that thereafter said corporation was merged by consolidation under the statutes of Ohio into the Lake Shore & Michigan Southern Railway Company, and that the Lake Shore & Michigan Southern Railway Company thereby became the successor and vested with all the rights, interests, and property franchises of said the Toledo, Norwalk & Cleveland Railway Company, and has since continued to maintain and operate said railway upon said premises; but it denies the averment in said petition contained that neither the said the Toledo, Norwalk & Cleveland Railway Company nor the said the Lake Shore & Michigan Southern Railway Company has ever made use of any portion of said strip of land lying east of the center line thereof. It says that it is not advised of the state of plaintiffs' title, and therefore denies the same. It admits that on or about the month of September, A. D. 1872, it entered upon a portion of said 100 feet immediately east of the center line thereof,—to wit, a strip 25 feet in width,—and that it has laid thereon a track as averred in said petition, and that it has since maintained and operated the same; but it denies that it did so wrongfully and unlawfully, and it denies that under and by virtue of the arrangement between the Lake Shore & Michigan Southern Railway Company and the defendant, the Lake Shore & Michigan Southern Railway Company intended to and did abandon the said 25 feet occupied by said defendant, or the remaining 25 feet east of the part occupied by the defendant; but it avers the fact to be that the said arrangement entered into by said railway companies was entered into by said the Lake Shore & Michigan Southern Railway Company and this defendant for the common benefit of both companies, in accordance with the powers conferred by the statutes of Ohio in such cases made and provided; and among other purposes it was designed to afford the means of interchange of traffic between said two named companies by furnishing means for connections of tracks, and that, shortly after the construction of defendant's railroad track, connection was made by the defendant with the tracks of the Lake Shore & Michigan Southern Railway Company, and the same has ever since been maintained and operated and used as a means of interchanging traffic from either of said lines to the other. It further says that it denies that the easement and rights of said the Lake Shore & Michigan Southern Railway Company in and to the 50 feet easterly of the center line have ceased and determined by virtue of said agreement of 1874; but it avers the fact to be that said the Lake Shore & Michigan Southern Railway Company still owns, occupies,

and controls the 25 feet easterly of the part occupied by this defendant. It denies the averment in said petition contained that the easement in the easterly 50 feet of said strip of the Lake Shore & Michigan Southern Railway Company has ceased and terminated. It further says that it denies that any acts of the defendant have affected the value of said portion fronting upon the river, and it denies that the strip of ground so as aforesaid occupied by it is of the value of (\$10,000) ten thousand dollars, as is averred in said petition. It denies that the excavations made by the defendant for the purpose of constructing its railway are of great depth, and that but for said excavation, and the existence of defendant railway, said river front would be of much greater value than it now is. It denies that the construction of its said line of railway upon said strip of ground has in any manner affected or impaired the communication and means of access from one portion of plaintiff's premises to the other; but it avers the fact to be that the original appropriation in 1851 completely severed the portion of said lots fronting upon the river from the portion lying easterly of the 100 feet thus appropriated, and that prior to the construction of defendant's railway the plaintiffs had no means of communication from one piece to the other across said 100 feet. It further avers that the grade line, upon which it located and constructed its said track, was such grade line as said the Lake Shore & Michigan Southern Railway Company, as the successor of the Toledo, Norwalk & Cleveland Railway Company, has the full and perfect right, under the said appropriation, to adopt as the line for double tracks or sidetracks in connection with its said line of railroad, and in furtherance of its said railroad.

"Second Defense. The defendant answering further says that, prior to the time of the construction of the defendant's railroad bed upon the lands described in the petition, the plaintiffs had acquired the title to said lot No. thirteen (13) as alleged in their petition, and were the owners thereof at the time and during the construction of said railroad by this defendant, as alleged in said petition; that said plaintiffs then well knew that this defendant claimed title to said twenty-five feet of land whereon its said road was being built, and entered upon, took possession of, and constructed its said road with the understanding and belief that it had a right to do so under its said contract with the said the Lake Shore & Michigan Southern Railway Company; that notwithstanding all this the plaintiffs stood by, acquiesced in, and encouraged the defendant in the construction of its said railroad upon said lot thirteen, (13,) and made no protest or objection thereto, and asserted no claim to the ownership of said right of way until

after the completion of said railroad, and the defendant says that by reason of the aforesaid acts of said plaintiffs they are thereby estopped from making the claim set forth in their said petition. Wherefore it asks to be dismissed with its costs."

The plaintiffs, by their reply, denied generally the allegations of new matter contained in the answer, and, upon the issues thus joined by the pleadings, the case was tried to a jury, which returned a verdict for the plaintiffs, assessing their damages in the sum of \$15,993.14. A motion for a new trial was overruled upon the plaintiffs remitting \$500 of the verdict, and judgment was thereupon rendered for the balance. The judgment was affirmed by the circuit court, and this proceeding is prosecuted here to reverse the judgments of the courts below. The questions arising upon the record, which it is deemed important to notice in the disposition of the case, together with any further statement necessary to their understanding and decision, will appear in the opinion.

E. W. Tollerton and J. H. Doyle, for plaintiff in error.

Frank H. Hurd and Charles Pratt, for defendants in error.

WILLIAMS, J.—In the former decision of the case, reported in 43 Ohio St. 228, 22 Am. & Eng. R. Cas. 129, it was held that the petition stated a cause of action entitling the plaintiffs to recover of the defendant, as in a Case stated. proceeding by it to appropriate the strip of land occupied by its railroad, compensation for the value of the land so occupied, and damages for the increased danger and inconvenience in the use of the plaintiffs' other lands from which the strip was severed, arising from the construction and operation of the defendant's road. Upon the trial of the case subsequently had in the court of common pleas upon the issues joined by the pleadings, it appeared that the Lake Shore & Michigan Southern Railway Company continued to own and use the west half of the right of way originally appropriated, which completely separated the plaintiff's river front from their other lands; and that no privilege of crossing the right of way, as a means of access from their river front to their lands on the other side, belonged to the plaintiffs. The court accordingly instructed the jury that the plaintiffs were not entitled to recover damages for the alleged injury to their river front, and withdrew the evidence relating to such damages from their consideration. With respect to the damages claimed for the injury to the plaintiffs' land lying east of the strip occupied by the defendant's road, and between it and the river road, evidence was given tending to show that the Lake Shore & Michigan Southern Railway Company never abandoned any part of its right of way lying east of the de-

defendants' roadway. Evidence was given by the plaintiffs tending to prove their damages, if such abandonment should be found by the jury. The jury found upon the question for the plaintiffs, and returned in their verdict, separately, the specific amount of damages so sustained. Upon the hearing of the motion for a new trial, the court, being of the opinion that part of the verdict was not sustained by the evidence, required the plaintiffs to remit the damages so assessed, which was done, and judgment entered for the remainder of the verdict. All questions have been thus eliminated from the case, except those relating to the plaintiff's right to recover the value of the strip of land occupied by defendant's road. This right, on the trial, was contested upon two grounds: (1) That there had been no abandonment by the Lake Shore & Michigan Southern Railway Company of that part of its right of way; and (2) that plaintiff was estopped, by their conduct, from claiming such abandonment. In the charge to the jury, after stating that the right acquired by the railroad company making the appropriation was an easement in perpetuity for railroad purposes in the strip of land so appropriated, which afterwards passed to and became the property of the Lake Shore Company, and that, by the contract referred to in the petition between the defendant and the Lake Shore Company, the latter company transferred to the defendant for railroad purposes 25 feet of the appropriated strip, the court said to the jury, "that the supreme court of this state has decided that, by virtue of such transfer, the Lake Shore Company abandoned its easement to the said twenty-five feet; and that thereby the said twenty-five feet reverted to and became the property of the plaintiffs, clear and free from the said easement." After the jury had retired, they returned into court, and requested that a portion of the charge be re-read to them, which was done without objection; and then, in response to an inquiry made by one of the jurors the court further said to the jury: "The supreme court decided that the contract made by the Pennsylvania Company and the Lake Shore Company worked an abandonment of that twenty-five feet, and that thereby it reverted to the plaintiffs, and they became the absolute owners of the property free from the easement." The defendant excepted to these portions of the charge, and requested the court to give in charge each of the following instructions, viz.: "(1) There is nothing contained in the contract between the Lake Shore Company and the Pennsylvania Company, of date January 4, 1874, whereby the former grants to the latter the said twenty-five feet of land, which in law amounts to an abandonment by the Lake Shore Com-

pany of its rights in said land. The Lake Shore Company had a right to make said contract, and the Pennsylvania Company acquired thereby a right to construct its road as it did upon said twenty-five feet of land, as described in said contract. (2) If the jury find that the Toledo, Norwalk & Cleveland Railway Company, in constructing its road, built the same substantially in the center of its one hundred feet of appropriation, then I charge you that this was a user of the entire one hundred feet; and if you further find that said track has ever since remained where originally built, then there never has been any abandonment by the said company, and your verdict must be for the defendant. (3) If the jury find that such use of the east fifty feet for support and protection was necessary, and the grant to the Pennsylvania Company and the construction of its track was in aid of such protection and an additional protection, such grant would not amount to an abandonment." The court refused to give either of these instructions, and the defendant excepted. It is clear that if the charge given was correct, there was no error in refusing the instructions requested, unless the decision upon the demurrer should be overruled. And though counsel for the plaintiff in error question the soundness of that decision, they recognize the well-established rule that, when it has been determined by this court that a petition states a cause of action, and the case afterwards comes before the court for the review of alleged errors occurring at the trial, the former decision will be followed unless it is very clearly erroneous. Their contention is, that the decision upon the demurrer has not the effect ascribed to it by the trial court in the portions of the charge under consideration. And whether it has, or not, is the question now before us.

Decision on
demurrer
followed.

The fact upon which the petition bases the alleged abandonment by the Lake Shore Company of its easement in the strip of land for which the plaintiffs claim compensation is the contract made between that company and the defendant, by which the former undertook to transfer that part of its easement to the latter for railroad purposes in perpetuity. The averments of the petition are that by the agreement between the two companies, the Lake Shore & Michigan Southern Railway Company, for the considerations therein named, "abandoned to the defendant, and undertook to permit and license the defendant to use and perpetually occupy for its railroad" the strip of land in question; and "the portion of said lot so abandoned" is shown by the diagram attached to the contract; and "that, by the abandonment as aforesaid,

Abandonment
created by
contract be-
tween two
companies.

the easement of the Lake Shore and Michigan Southern Railway Company ceased and terminated; and "that portion of said lot so abandoned to and occupied by the defendant is of the value of ten thousand dollars." No other abandonment than that resulting from the contract is alleged in the petition; nor is the abandonment placed upon any other ground. True, the petition avers that the Lake Shore Company never had any interest in the land except that acquired by the appropriation, which was but an easement, and that it never used any portion of the strip so acquired, lying east of the center line thereof. But it is nowhere charged or claimed in the petition that the abandonment resulted from such non-user. As we understand the decision upon the demurrer, it was held that, upon the averments of the petition, the plaintiffs might treat that part of the easement which the Lake Shore Company transferred to the defendant as abandoned by the former company, and recover of the defendant as upon an appropriation; and by that decision, fairly construed, in view of the allegations of the petition, it was settled, we think, that the effect of the contract between the Lake Shore Company and the defendant was to work the abandonment of that portion of the right of way described in it. The answer does not controvert the making of the contract between the two companies, as alleged in the petition, but denies that the Lake Shore Company intended to or did thereby abandon any of its right of way, or that its easement or right of way ceased and determined by virtue of the contract. These denials, in the light of the former decision, raised no issue of fact. They are the pleader's construction of the contract, and his opinion of its legal effect. It is further averred in the answer that the contract was entered into for the common benefit of both companies, and was designed to afford means for the interchange of traffic between the two companies; and it is contended in argument that the Lake Shore Company retained a beneficial use of that part of its right of way transferred to the defendant by the contract resulting from the protection afforded by the defendant's roadway to the tracks of the Lake Shore Company. The agreement between the two companies is expressed in the written instrument. It is no part of that agreement that the Lake Shore Company shall retain for any purpose any control of or interest in that part of the right of way transferred by the agreement to the Pennsylvania Company, nor that the latter shall so construct or maintain its roadway as to protect the tracks of the former. It may incidentally result that the tracks of the Lake Shore Company will receive some protection from the grade of the defendant's road as

now constructed, but such incidental protection confers on the former company no right in or control over the latter's road, or the strip of land transferred to it by the contract. The agreement imposes no obligation upon the Pennsylvania Company to maintain its roadway as now constructed. It may change the grade at pleasure, and any right to use or control any part of the right of way occupied by the defendant, which the Lake Shore Company may hereafter acquire for the protection of its tracks, must depend upon future conventional arrangement between the two companies. And so with regard to the interchange of traffic between the two companies, or for the use of the tracks of each company for the common benefit of both; for nothing on either subject is found in the written contract. By that contract, the surrender by the Lake Shore Company of its dominion over that part of its right of way therein described was complete. The charge of the court with respect to the effect of the former decision was, we think, free from error.

2. The estoppel pleaded by the defendant is, in substance, that the plaintiffs, being the owners of the premises on which the defendant was constructing its railroad, and knowing that the defendant claimed title under its contract with the Lake Shore Company to that portion on which its road was being built, stood by, acquiesced in, and encouraged the defendant in the construction of the road, and asserted no claim to any part of the right of way until after the road was completed. Upon the trial of the case, the inquiry in regard to the estoppel was allowed a somewhat more extended range, and evidence was admitted tending to show an estoppel by declarations and conduct of the plaintiffs, which induced the defendant to enter into the contract with the Lake Shore Company. The defendant was given the benefit of this evidence, as well as of the evidence tending to prove the estoppel pleaded, as appears from the charge of the court, which, upon this branch of the case, was as follows: "Where one person, by his acts or declarations made deliberately, and with knowledge, induces another to believe certain facts to exist, and that other person rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the persons so misled. This definition embraces all the essential elements of an estoppel. It will be your duty to examine the evidence, and ascertain whether all these elements are proved in this case substantially as I have stated them. Inquire first if the plaintiffs said or did anything, and, if so, what, to induce the Penn-

Estoppel of
plaintiffs.

Same—Charge
of the court.

sylvania Company to enter into this contract with the Lake Shore Company, which is set out in the petition. Merely standing by with knowledge that the railroad company has entered upon the land, and is constructing its railroad thereon, and making no objection, is not of itself sufficient. Such conduct might deprive the owner of his right to reclaim the land, or to enjoin the operation of the railroad, or to recover the value of the improvements put upon the land by the railroad company, but something more is necessary to bar his claim to recover compensation for the land taken. Did the plaintiffs know that this contract, or substantially such a contract, was about to be made, and did they, by their conduct or declarations, fairly lead the defendant to understand and believe that by such contract the defendant would get the title to this strip of land free from any claim of the plaintiffs to compensation? To estop the plaintiffs, by their acts or declarations, such acts or declarations must have come to the knowledge of and be relied upon by the defendant. Any statements made by the plaintiffs to the Lake Shore Company, of which the defendant had no knowledge, or upon which they did not rely, are not sufficient to create an estoppel. If the plaintiffs knew of this contract, they and the defendant are alike presumed to know what the legal effect of the contract was, viz., that it would work an abandonment by the Lake Shore Company of its easement in this strip of land, and restore the land to the plaintiffs free from the easement; and the conduct of both parties must be considered in the light of such a presumption. The defendant, knowing the legal effect of such a contract, would enter into it at its peril, unless it was fairly led to believe by the declarations or the acts of the plaintiffs that it might do so without incurring any liability to them. If the plaintiffs knew that a contract was about to be made between the Lake Shore Company and the Pennsylvania Company, whereby the former company would cede to the latter company the right to occupy and forever maintain and operate its railroad upon this strip of twenty-five feet, and induced the defendant to believe that they had no claim or would assert no claim by reason of such contract, and in reliance upon this belief the defendant entered into the contract, the plaintiffs then would be estopped from maintaining this action; or if plaintiffs requested the Lake Shore Company to cede to the defendant twenty-five feet of said right of way, for the purpose of constructing and permanently operating defendant's railroad thereon, and the defendant knew of such request, and in reliance thereon entered into the said contract, and the plaintiffs gave no notice to either company that such contract would be treated as an abandonment, then the plaintiff-

iffs are estopped. But if the plaintiffs had no knowledge that a contract was entered into for a permanent occupation by the Pennsylvania Company of this twenty-five feet for its railroad, or that such contract was about to be entered into, or if the defendant had no knowledge of the alleged acts or declarations of the plaintiffs, or if it had reason to believe that an abandonment would be claimed by the plaintiffs, then the plaintiffs are not estopped."

The defendant took exceptions to portions of this charge. An extended discussion of the exceptions would not be profitable. We see no error in the charge prejudicial to the defendant. Upon the estoppel pleaded in the answer, it follows the case of *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 Ohio St. 169, and the definition of all estoppel *in pais*, contained in the first paragraph above quoted, to which the defendant excepted, is adopted literally from the opinion of the court in the case of *Ensel v. Levy*, 46 Ohio St. 255. We have been unable to discover that any part of the charge is in conflict with the cases of *Smiley v. Wright*, 2 Ohio, 506, *Resor v. Mississippi R. Co.*, 17 Ohio St. 140; *Rosenthal v. Mayhugh*, 33 Ohio St. 155, relied on by counsel for the plaintiff in error. In *Smiley v. Wright*, a widow, who was entitled to dower in land sold at public sale, was present at the sale, and agreed that the land might be sold free of her dower. It was publicly proclaimed in her presence that the land would be sold free of her dower, and it was so sold. It sold for a larger sum on that account than it otherwise would. She afterwards brought suit for dower against the purchaser, and she was held estopped. By her agreement and conduct she induced the purchaser to buy the land, and pay for it more than he would otherwise have done. In *Resor v. Mississippi R. Co.*, "a vendor put his vendee into possession, and executed and placed in his hands a deed of conveyance for the land sold with an understanding between them that the deed should not be considered as delivered, or become effectual, until the purchase money should be paid; and the vendee subsequently put the deed upon record, and, without paying the purchase money, mortgaged the land to *bona fide* mortgagees for value, and without notice;" and it was held that the vendor was estopped, as between him and the mortgagees, from denying the delivery of the deed, or asserting any claim to the land. In other words, the vendor clothed the vendee with all the evidences of title, enabled him thus to appear of record as the owner, and the mortgagees acted upon his title thus appearing of record. The vendor's conduct amounted to a representation to the mortgagees that the vendee was the owner

Same—Charge
as to estoppel
not erroneous.

of the land, upon the faith of which, the mortgagees loaned their money. As was said by WELCH, J., in the opinion, the vendor "by his own acts, in putting the land and deed of conveyance therefor into the possession of the company, plainly said to the world that the company was the owner of the land, and might safely be dealt with as such, as much so as if he had stood by and told the mortgagees that the vendee was the owner." In *Rosenthal v. Mayhugh*, a woman whose husband had deserted her, and who had not been heard from for seven years, under the belief that he was dead, joined with the children, to induce a sale of land which belonged to him, in representing that he was dead, and they thereby effected the sale. She also as widow joined with the children in a conveyance in fee with covenants of warranty, and the contract was fully executed by the purchaser. It was held that, although the husband was still living, she was estopped from treating the contract as a nullity, and, upon the death of her husband, from asserting her right to have dower assigned her. In each of these cases, all the elements of an estoppel as defined by the court in its charge, were present. It is, we think, by these, and other adjudications in this state, fully established that in order to estop an owner from asserting title to his property, by his declarations or conduct, it must appear that he was at the time apprised of the true state of his title; that he knew or had reason to believe his declarations or conduct would be acted upon by another; that they were acted upon by such other person in ignorance of the title; and that such person will be injured by allowing the truth of the admission by the declaration or conduct so acted upon by him to be disproved. And while an owner, who stands by, and, without objection, sees a railroad constructed on his land, will after the road is completed, or large expenditures have been made thereon upon the faith of his apparent acquiescence, be estopped from reclaiming the land, or enjoining its use by the railroad company, he is not thereby estopped from claiming compensation for its value.

The charge of the court is in conformity with these rules; but the several instructions requested by the defendant on the subject, which were refused, are not. Each lacks some essential ingredient of an estoppel. They are as follows: "(1) If the jury find from the evidence that the plaintiffs were the owners of the land in question at the time of the construction of the defendant's railroad thereon, and knowing that the same was being built by the defendant upon the belief that it had the title thereto, stood by and made no objection or protest to the defendant against its construction upon their said land, then

Instructions
requested by
defendant.

the plaintiffs are estopped from making their claim in this action, and your verdict must be for the defendant. (2) If the jury find from the evidence that the plaintiffs induced the Pennsylvania Company to locate its railway upon their property, and knew that the defendant in so constructing its road relied upon its title to said way and its right to so construct its road, then the plaintiffs are estopped from asserting any claim to any portion of said land, and your verdict must be for the defendant. (3) It was competent for these plaintiffs to waive the right to insist upon an abandonment, and if the jury find that the plaintiffs requested the Lake Shore Company to cede to the defendant twenty-five feet of the said right of way for the purpose of erecting and maintaining its track thereon, and made no claim to either company, and gave no notice that such action would be treated as an abandonment, the plaintiffs would now be estopped to claim that such ceding or grant was an abandonment. (4) If the plaintiffs knew of their rights, and, knowing them, permitted the Lake Shore Company to grant the right to the defendant herein to build, maintain, and operate its track, in the belief that it had the right so to do, and the plaintiffs saw the defendant spending money in making valuable and permanent improvements thereon without knowledge of plaintiffs' rights, and the plaintiffs kept silent until after the expenditure and improvements were made, they will be estopped from claiming either compensation or damages, and your verdict must be for the defendant." The first instruction is in conflict with *Goodin v. Canal Co.*, *supra*. The second omits the essential elements that the plaintiffs knew of their own title, and the defendant was ignorant of it. Besides there was evidence tending to prove that the defendant located and constructed its road on lands belonging to the plaintiffs other than that for which they were claiming compensation in the action, and the instruction if given would have been misleading, for it would have authorized the jury to find the estoppel, if the plaintiffs induced the defendant to locate its road on any of their property. The instruction, if otherwise correct, should have been limited to the property for which the plaintiffs were seeking compensation. The defect in the third instruction is that it is not made necessary to the estoppel that the request of the plaintiffs should have been acted upon by, or have influenced the conduct of, either company; and the fourth is not substantially different from the first. Finding no error in the record, the judgment is affirmed.

Abandonment by Railroad Company of Right of Way—Rights of Landowner.—See *ante* *Beattie v. Carolina Central R. Co.*, and note pp. 524, 535.

Abandonment of Strip by Railroad—Evidence—Admissibility of Deed.—A deed to trustees, in temporary possession of a railroad, of a strip of land included in its original location, which recited their opinion that increase of business required its purchase, is admissible, on the issue of its abandonment by the railroad as tending to show that the grantees did not then claim to have a right to use it, although the conveyance was subject to a prior mortgage the foreclosure of which rendered the grant ineffectual. *Westcott v. New York & N. E. R. Co.*, 152 Mass. 465.

Narrowing Location of Railroad—Abandonment of Strip.—Upon the issue of the abandonment by a railroad corporation of a strip of land half a rod wide on one edge of its location, there was evidence that, shortly after the road was located five rods wide, the directors passed a vote looking to the narrowing of the location in certain places, and providing how it should be done; that subsequently the damages caused by the railroad to the parcel, of which the strip formed a part, were awarded, with the corporation's consent, and the same paid, and a release given, on the basis of a location four rods wide; and that for thirty years thereafter the corporation maintained a fence which excluded the strip and marked the location as apparently four rods in width. *Held*, that the evidence was sufficient to go to the jury, and to warrant a finding of abandonment. An abandonment of a right of way is usually and properly shown by acts which do not appear of record; and it need not appear of record in order to be effectual. *Westcott v. New York & N. E. R. Co.*, 152 Mass. 465.

FORT WORTH & RIO GRANDE R. CO.

v.

JENNINGS.

(76 Texas, 373.)

Right of Way—Building Another Road—Additional Servitude—Injunction.—Building another railroad on a portion of the unused right of way of a railroad company, which it has acquired by purchase, creates an additional servitude upon the easement, and the consent of the owner of the land must first be obtained, and compensation made to him for the damage, although the company to which the right of way was originally conveyed has transferred a part of it to the company building the additional road. The owner of the fee may enjoin the second company from building its road until compensation has been made.

COMMISSIONER'S decision. Appeal from Tarrant County District Court.

Action against the Fort Worth & Rio Grande Railway Company to restrain the building of a railroad on land over which plaintiff had granted a right of way to the Texas & Pacific Railway Company. Plaintiff obtained judgment. Defendant appeals.

N. A. Stedman, for appellant.

John D. Templeton and *Hyde Jennings*, for appellee.

COLLARD, J.—The conveyance of plaintiff to the Texas &

Pacific Railway Company of a right of way through her land in the city of Fort Worth vested in the company a perpetual easement for the purposes of right of way for its road. *Pierce*, R. R. 130. The fee was not conveyed, but remained in the vendor. This company, having constructed its road on the right of way designated, and operating the same, transferred a part of its right of way, between its track and adjacent lots, to appellant, the Fort Worth and Rio Grande Railway Company; and the latter company has taken steps to build its road on this strip without compensation to Mrs. Jennings, whose adjacent lots will be injured or damaged by depreciation in value, if the road is built. Can this be done? The direct question has not been decided in this state: but kindred questions have been decided and discussed by the supreme court, a brief review of which will greatly aid us in deciding the question before us.

Question
presented.

In the case of *Houston & T. C. R. Co. v. Odum*, 53 Tex. 353, 2 Am. & Eng. R. Cas. 503, Justice GOULD, delivering the opinion, says: "The use of a street by a railroad, however, is not ordinarily inconsistent with its continued use for the common purpose of a street. The authorities are numerous and conclusive that such an addition to the uses of a street, the fee being in the public, if authorized by the legislature, gives the lotowner no right to compensation, although his easement in the street be partially impaired, and his lots rendered less valuable. The regulation or enlargement of the use of the street—the property of the state—by the legislature is not a taking of property, within the meaning of the constitution of 1869, although the lotowner may thereby suffer incidental or consequential inconvenience or injury." The constitution of 1869 provided that "no person's property shall be taken or applied to public use without just compensation being made, unless by the consent of such person." Const. 1869, art. 1, § 14; 2 Pasch. Dig. 1101. The owner's rights in property are better guarded under the constitution of 1876. It declares that "no person's property shall be taken, damaged, or destroyed for, or applied to, public use without adequate compensation being made, unless by consent of such person." Const. 1876, art. 1, § 17. Construing this language, it has been held that the term "property" as here used, means "not only the tangible thing owned, but also every right thing which accompanies ownership, and is its incident," and that, where the construction of a railroad inflicts an injury to such property not common to all other property in the same community by reason of the general fact of the existence of the rail-

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way, then such property may be said to be damaged, for which there must be compensation to the owner. *Gulf, C. & S. F. R. Co. v. Fuller*, 63 Tex. 467, 22 Am. & Eng. R. Cas. 154. The court affirmed a judgment for damages in favor of the owner of lots and improvements on a street in which, by legislative authority, a railway company had built its road. In another, later case, decided at the Galveston term, 1889, Justice GAINES, commenting upon the language of the constitution, says: "Under the provisions of other constitutions, which merely provided compensation to the owner for property taken for public use, it had been a question whether or not one whose property was immediately and directly managed by a public improvement, though no part of it was appropriated, could recover for such damages. * * * The insertion of the words 'damaged or destroyed' in the section (of the constitution) quoted was doubtless intended to obviate this question, and to afford protection to the owner of property by allowing him compensation when, by the construction of a public work, his property was directly damaged or destroyed, although no part of it was actually appropriated." *Trinity & S. v. Meadows*, 73 Tex. 34, 39 Am. & Eng. R. Cas. 29.

It will now be seen that it is the law of this state that there need be no taking or actual appropriation of property to entitle the owner to damages on account of the construction of a railroad, or other public works adjacent thereto, but that it is sufficient if the property be thereby directly and specially damaged, —depreciated in value,—as a result not common to all such property in the same community; and it will also be seen that, where land has once been dedicated to the public as a highway, it cannot, even upon authority of the legislature, be appropriated to other public uses, so as to impose additional burdens upon other adjacent property, without adequate compensation to the owner. *Wood, Ry. Law*, 721 *et seq.*; *Pierce, R. R.* 232. The rights acquired by condemnation of land for public purposes are similar to those ordinarily acquired by contract, unless otherwise stipulated in the deed. *Mills, Em. Dom.* §§ 110, 111; *Pierce, R. R.* 132. The use of a street for a horse-car railway is not deemed a different use from that intended in its original dedication as a street. *Texas & P. Ry. Co. v. Rosedale St. Ry. Co.*, 64 Tex. 80, 22 Am. & Eng. R. Cas. 160.

The appellant contends, in this case, that a transfer of a part of its right of way by the Texas & Pacific Railway Company to the appellant did not contemplate a use different from that intended in the deed conveying to it the right of way, and consequently there could be no additional burden

Imposition of
additional
servitude.

upon plaintiff's land by the building and running of defendant's road thereon. We cannot agree to this proposition. The deed of the right of way was to the Texas & Pacific Railway Company, granting it the right to use the same perpetually in operating its road. There is no doubt that a legal sale of the franchise and road would carry everything appurtenant thereto,—the right of way as well as the right to operate the road, and take tolls for freight and passengers; but it may be doubted that it can sever a part of the easement—an incident of the franchise—from the franchise itself, and convey the same to another company. It has been held by the supreme court of the United States that "the right of way could not be sold, on execution or otherwise, to a purchaser who did not own the franchise." *East Alabama R. Co. v. Doe*, 114 U. S. 341, 20 Am. & Eng. R. Cas. 566. The same doctrine is maintained in Ohio. *Platt v. Pennsylvania Co.*, 43 Ohio St. 228, 22 Am. & Eng. R. Cas. 129. But, where one company sold its entire right of way to another authorized to build and maintain a road between the same points, it was held that the owner of the fee was not injured or affected by the transfer, and that he could not call in question the capacity of the one company to sell, nor the other to purchase. *Crolley v. Minneapolis & St. L. R. Co.*, 30 Minn. 541, 14 Am. & Eng. R. Cas. 47. A railway company pledged its road and appurtenances to the state. The road was sold to satisfy the pledge, and Lane purchased one section of the road. Without deciding whether his purchase included any of the corporate franchises in conjunction with other purchases, it was held that a sale by him to the Junction Company passed title to the right of way, provided it constructed the road as required by the first corporation. *Junction R. Co. v. Ruggles*, 7 Ohio St. 1. Where depot grounds were deeded to a railway company, and, under sanction of the legislature, the property became vested in another company, it was held that the conditions of the original sale, to the use of the first company, was not violated. *Southard v. Central R. Co.*, 26 N. J. Law, 13. A railway company made an assignment of its road and effects, which was adjudged valid by the courts. It was held that purchasers at the trustee's sale, who afterwards incorporated, acquired all rights of the old company under deed to the right of way. *Pollard v. Maddox*, 28 Ala. 321. It has been held that the interest in land acquired by deed to the right of way, within the designated route, may be transferred to another railroad company, into which the original shall merge or consolidate with others by legislative authority. *New Jersey Midland R. Co. v. Van Syckle*,

46 A. & E. R. Cas.—37

Construction
of another
road addi-
tional burden.

37 N. J. Law, 496; Pierce, R. R. 130, 132, 133, 496, 497. The foregoing four cases are cited in Pierce on Railroads in support of the doctrine as stated in the text, "that a railway company * * * may convey, under authority of law, to another corporation, the interest in land which it has acquired by purchase for a right of way, to be used by the purchaser for the same purpose." And we find that none of the cases supports the proposition that a railway company can sell a part of its right of way to another company, so as to enable both companies to build and operate two roads on the same right of way. These authorities only go to the extent of holding that, where there is a legal sale of the road, its corporate rights, or when there is a merger of roads, or where one road is abandoned, and another company is authorized to construct the road on the same line, the right of way may pass by sale.

It may not be necessary, in the case before us, to decide whether a railway company owning the right of way may or may not, with the consent of all interested parties, sell a part of it without at the same time conveying its franchise. It may be only necessary for us to inquire if this can be done without the consent of adjoining land-owners, without compensation, by purchase or condemnation, where their lands are damaged specially, and not in common with the general public. Appellant cites the case of *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 118, as sustaining its right to take the strip conveyed to it by the Texas & Pacific Railway Company, and construct its road thereon, without compensation to plaintiff for additional damages to her land. The land of plaintiff, in the case cited, was appropriated, under the right of eminent domain, for the purposes of a canal. The canal was made, and used for many years. A railway company, by amicable agreement, had the canal company's interest in the right of way condemned for its use as a railway without the consent of, or compensation to, the owner of adjoining land. The canal was abandoned, and the railroad constructed on the line. It was held that the easement was not abandoned by the canal company to the extent that it reverted to the original owner of the land; but it was also held that the owner was entitled "to recover the value of lands taken, not formerly taken by the original condemnation, and also a fair compensation for additional burdens and inconveniences, not common to the general public, as accrued to him, and his entire tract on which the easement was imposed, by reason of the change of uses." We do not see in what respect this case supports the position of appellant; but, if it is supposed to do so, it was

Same-Com-
pensation
necessary.

overruled in the later case of *Platt v. Pennsylvania Co.*, decided in 1885 by the same court, which is a case almost exactly in point with the one now under consideration. The Lake Shore Railroad Company had appropriated by condemnation a strip of ground 100 feet wide by 1,200 feet in length, and constructed its road on the western half, along which the road was operated. For a consideration of \$7,500, the company agreed with another railroad corporation to let it have 25 feet wide of the unused half upon which to construct and operate another road, and to so hold the same in perpetuity. The second road was built and operated on the surplus 25 feet, but no consideration was paid to the original owner, whose lot was thereby damaged. It was held that the land-owner, by the first appropriation (where more land was appropriated than was necessary, an easement, and not a fee, having passed), could not be subjected to the occupancy and burden upon such surplus of another common carrier. It was also held that the original owner could not have recovered the surplus from the first company, but had the right, after its sale, to treat it as abandoned by the first company for its own uses, and that he was entitled to damages as upon an appropriation by the second company. It was also noted by the court that this holding was not in conflict with the recognized right of a railway company to sell or lease its road with its franchises. 43 Ohio St. 228, 22 Am. & Eng. R. Cas. 129. The court also declared that plaintiff's case was supported by the cases of *Junction R. Co. v. Ruggles* and *Hatch v. Cincinnati & I. R. Co.* There was a dissenting opinion, holding that there was no change in the use of the easement, and therefore no additional servitude upon the owner's land; but we think the reasoning of the majority of the court is conclusive and just. It cannot be doubted that a right of way to one railroad is less onerous than when the same is granted to two, and it must be held that a grant of way to one does not authorize it to operate its road, and to convey a portion of the unused way to another company for the same purpose, without the consent of the owner of adjacent land damaged thereby, and without compensation to him for the damage so caused.

We think injunction to restrain the building of the road by defendant until the plaintiff was compensated, or until the way was properly appropriated under the law, was the proper remedy. *Pierce, R. R.*, 167, 168, 230.

Appellant contends that the court erred in overruling its general demurrer to plaintiff's petition because so much of said petition alleges damage on account of the contemplated construction and operation of defendant's railway across

Hill, Ochiltree, Ballinger, and Center streets, to property not abutting on the right of way of the Texas & Pacific Railway Company, sets up a claim for damages too remote to furnish a basis for an action; and the injury, if any, is not special to plaintiff." If there was error in this part of plaintiff's petition, it being good in other respects, a general demurrer would not reach the defect.

The judgment of the court restrained defendant from building its road on the part of Texas & Pacific Railway Company's right of way running through any portion of blocks 12, 13, 25, and 29 of Jennings' south addition to the city of Fort Worth, and also that portion of the right of way occupying Hill and Center streets, at the intersection of said streets, between the center of said railway track and said block 29. The judgment awards and fixes no damages, but prohibits the building of the road without the consent of the plaintiff, his heirs or assigns, first had and obtained, or without proper appropriation of the same under the laws of the state. Hill and Center streets intersect at the corner of block 29, where the right of way cuts off a corner of the block. The block abuts on the side of the right of way on which defendant proposes to build its road. We cannot say that there would be no damage to plaintiff by the construction of the road at this point, so causing additional obstruction in these streets. The question of the amount of damage must be settled by the parties, if they consent, or in the proceedings of condemnation, if defendant resort to that method of appropriation, as allowed by the judgment. Our conclusion is, the judgment of the court ought to be affirmed.

STAYTON, C. J.—Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

Enjoining Interference with Construction of Road Where Title to Land is in Doubt.—In *Roanoke Navigation Co. v. Emry*, (N. Car. Sup. Ct., Feb. 24, 1891), 12 S. E. Rep. 900, plaintiffs sought to enjoin defendants from interfering with the construction by plaintiffs of a railroad to an elevator and mill which it was engaged in building. Plaintiff's petition alleged that the land over which the road ran was its own; that it had contracted for a large amount of machinery for the construction of the mill and elevator, and had gone to great expense; and that the road was necessary for carrying out the enterprise. Defendant claimed title to part of the land over which it was supposed to be constructed. Whether the road was to be constructed entirely on the plaintiff's land or not was not left free from doubt by the evidence. It was shown, however, that the construction of the road could not greatly damage the defendant. The enterprise of the plaintiff was very important and was one that should be encouraged. The court held that the defendants should be enjoined from interfering with the construction of the road, and should be left to their remedy on plaintiff's bond. The court said:

"It is against the policy of the law, to restrain, delay, and hinder such industry and enterprises as develop the country and its resources. This ought not to be done unless in cases where serious harm may come to the party complaining. The plaintiff alleges, and the evidence tends strongly to prove, that the roadway is on its own land, and it is in possession. The courts have in many cases not unlike the present one granted relief by injunction pending the action; and, when the evidence has left the material matters in dispute in doubt, this court has generally directed the order granting such injunction to be affirmed. Here the defense alleged by the defendants is more than doubtful; but we are not to be understood as expressing any opinion upon the facts further than as may be proper in directing an affirmance of the order appealed from. *Parker v. Parker*, 82 N. C. 165; *Lumber Co. v. Wallace*, 93 N. C. 22; *Lewis v. Lumber Co.*, 99 N. C. 11; *Evans v. Wilmington & W. R. Co.*, 96 N. C. 529; *Whittaker v. Hill*, 96 N. C. 2."

Consent of Mortgagor to Construction of Railroad—Acquiescence of Purchasers at Foreclosure Sale—Equity will not Compel Company to Tear up Track.—In *Chambers v. Baltimore & Ohio R. Co.*, (Pennsylvania Sup. Ct., Jan. 6, 1891), 21 Atl. Rep. 2, it appeared that the owner of land upon which there was a mortgage had, after the execution of such mortgage, consented to the construction of a railroad thereon. The mortgage was foreclosed, and the purchasers at the foreclosure sale acquiesced for nearly twenty years in the use of the track so constructed. They also used the track jointly with the railroad company for receiving supplies for their factory, and shipping away products. *Held*, that a court of equity will not compel the railroad company to tear up the track, although it has never acquired a permanent right of way across the land. The court said: "We are not now considering the question in a court of law, but in a court where a decree is of grace. A chancellor cannot be called upon to make an inequitable decree."

Limitation of Action for Construction of Road Over Plaintiff's Land.—In *Harshbarger et al v. Midland R. Co.*, (Indiana Sup. Ct., April 25, 1891), 27 N. E. Rep. 352, the action was brought for the assessment of damages accruing by reason of the construction of a railroad across land now owned by the plaintiff, which she inherited from her father and mother. It appeared that the company entered upon the land in question in 1873, during the lifetime of plaintiff's ancestor, who was then in possession, and who consented to the construction of the railroad. The company which constructed the road mortgaged the property, and the defendant purchased it at a foreclosure sale, and succeeded to the rights of the old company. Plaintiff's rights were acquired in 1876, and in 1888 she began this action. *Held*, that the cause of action for damages accrued in 1873 in favor of the then owner, and the right to recover was barred after a lapse of six years. The rights acquired by the old company were not abandoned, but the defendant took possession by virtue of its purchase at the foreclosure sale, and as successor to the rights of the old company.

Conveyance of Depot Site to President of Railroad Company—Failure of Company to Reimburse him—Title of Bona Fide Purchaser from President.—In *Rio Grande & E. P. R. Co. v. Milmo et al.* (Texas Sup. Ct., Feb. 20, 1890), 15 S. W. Rep. 475, it appeared that certain land was conveyed to the president of a railroad company to hold in trust for the company, the purchase having been made by him to be used as a depot site. The president paid for the land with his own money, and intended to reconvey it to the company upon its reimbursing him. The railroad company took possession of the land from the time the president acquired his deed but failed to pay him the amounts disbursed. Subsequently, the president conveyed the land to a third party. The railroad was sold under the foreclosure of a

mortgage, and the purchaser at the foreclosure sale claimed title to the land. *Held*, that the president's grantee had the superior title.

Adverse Possession—From What Time Possession of Railroad Dates Under Grant of Right of Way.—Possession by a railroad company and its successors under a grant which contemplates the construction and operation of a railroad, dates from the time construction commences, and not merely from the time the road is completed, and trains begin to run. *Georgia Pac. R. Co. v. Strickland*, 80 Ga. 776.

Deed from Railroad Company to Union Depot Company—Exclusive use of Tracks—Construction.—In *St. Paul M. & M. R. Co. v. St. Paul Union Depot Co.*, 44 Minn. 325, a deed of conveyance from the St. Paul, Minneapolis & Manitoba Railway Company to the St. Paul Union Depot Company, and a lease from the latter company to the former, was considered and construed with reference to the rights of the first-named corporation to the exclusive use and occupation of certain specified railway tracks and adjoining platforms in the train-house, or annex to a depot building.

TERRE HAUTE & LOGANSFORT R. CO.

v.

HARRIS.

(126 Indiana, 7.)

Right of Way—Submission of Amount of Damages to Arbitration—Enforcement of Award.—In an action for the recovery of damages occasioned by the appropriation of plaintiff's land for the right of way for a railroad company, without making compensation, the answer of the defendant company sets up a good defense, when it alleges that the amount of damages to be paid for such right of way have been submitted to arbitration under an agreement between the plaintiff and a contractor, who had agreed to obtain a right of way; that the arbitrators had made an award; and that the contractor had been, and is ready and willing to fulfill the same, and before the commencement of the action had tendered the amount of the award to plaintiff, which had been refused. Such a submission to arbitration is a bar to plaintiff's action, although the award has not been performed.

APPEAL from Marshall County Circuit Court.

H. Corbin and *John G. Williams*, for appellant.

McLaren & Martindale, for appellee.

COFFEY, J.—The complaint in this cause consists of two paragraphs. The first is a complaint in ejectment, in the usual and ordinary form. The second seeks to recover from the appellant damages occasioned by the appropriation of the land therein described for the right of way for a railroad track, and the use of the same for that purpose. The third paragraph of the appellant's answer avers that the appellant employed one Toner to obtain the right of way for its road, and to construct its roadbed over the lands of the appellee; that the roadbed was constructed

over and across said land under a license so to do, but without any assessment or agreement in relation to the damages occasioned thereby; that, on the 14th day of October, 1887, the said Toner and the appellee entered into a written agreement, by the terms of which they agreed to and did submit the question of damages occasioned by the construction of said road to Charles E. Toan and D. A. Snyder, and agreed to abide by the assessment so made by them; that the appellee agreed to execute to appellant a written release to said right of way, and that the said Toner agreed to pay the appellee upon the execution of said release, the amount of damages so assessed by the said Toan and Snyder; that, on the 17th day of October, 1877, said Toan and Snyder met and assessed said damages at the sum of \$100, and made and signed a written statement thereof; that said Toner has at all times since said assessment was so made been ready and willing to pay said sum of \$100 upon the execution of said release, and before the commencement of this suit tendered to the appellee said sum, which the appellee refused. Copies of said agreement and written award are filed with and made a part of this answer. The court overruled a demurrer to this answer, whereupon the appellee replied by a general denial. A trial of the cause by a jury resulted in a verdict for the appellee for the sum of \$300, upon which the court over a motion for a new trial, rendered judgment. The appellant, by a proper assignment of error, calls in question the ruling of the circuit court in overruling its motion for a new trial, while the appellee, by assignment of cross-error, calls in question the propriety of the decision in overruling the demurrer to the third paragraph of the answer.

The first question, in the natural order, demanding consideration, is the question raised by the assignment of cross-error. The facts disclosed by the third paragraph of the answer constitute a good common-law arbitration. *Titus v. Scantling*, 4 Blackf. 89; *Hays v. Miller*, 12 Ind. 187; *Forqueron v. Van Meter*, 9 Ind. 270; *Coffin v. Woody*, 5 Blackf. (Ind.), 423; *Moore v. Barnett*, 17 Ind. 349. The submission of the cause of action set up in the complaint to arbitration and award thereon is a bar to such cause of action, though the award has not been performed. *Walters v. Hutchins' Adm'rx*, 29 Ind. 136; *Armstrong v. Masten*, 11 Johns. 189; *Jessiman v. Haverhill & F. Iron Manufactory*, 1 N. H. 68. This answer, therefore, constitutes a complete defense to the cause of action contained in the second paragraph of the appellee's complaint, provided it is sufficiently shown that the appellant stood in a situation to avail itself of the submission and award,

Submission to arbitration—
Answer set up good defense.

If Toner was a mere stranger and volunteer, with no power to bind the appellant, the arbitration and award would be no defense for the appellant, unless it afterwards ratified his action. But even if Toner had no interest in the controversy, and no power to bind the appellant, as he acted upon its behalf and for its benefit, if it afterwards ratified his conduct, the submission and award became binding on both it and the appellee. 6 Wait, Act. & Def. pp. 506-510. It is important, therefore, to a correct decision of the question before us, to ascertain the relation in which the appellant stood to the matter submitted to arbitration. The agreement to submit the damages in controversy to arbitration is signed by Toner and the appellee, and is filed with and made a part of this answer. This agreement recites the fact that the appellee was about to institute suit against the appellant to recover damages on account of the appropriation of the land described in the complaint for the construction of its road without first causing the damages to be assessed and tendered; that the road was constructed by Toner, who had obligated himself to the appellant to obtain the right of way for the construction of the road, and had failed to obtain such right over the lands of the appellee; and that to prevent litigation and delay, and the expense incident thereto, the question of the amount of damages sustained by the appellee on account of such appropriation is submitted to two citizens of Marshall county, named in the agreement. As to the facts recited in the agreement the parties must be held as concluded. *Forqueron v. Van Meter, supra.*

It will thus be seen that the appellant was directly interested in the settlement of the matters submitted to arbitration by the appellee and Toner. The amount of damages sustained by the appellee on account of the appropriation of his land for the use of the appellant's road was a claim against the appellant which it was bound to pay. It further appears that Toner was authorized by the appellant to procure the right of way for its road, and the appellant is now here claiming the benefit of the award, thus fully ratifying Toner's action. In our opinion, it not only sufficiently appears that Toner had authority to act for the appellant, but that the appellant is willing to abide by the submission made by him. The third paragraph of the answer, we think, states facts sufficient to bar the cause of action set up in the second paragraph of the complaint. The evidence in the cause fully sustains the material averments in the answer. Indeed, there is no controversy about the fact that the claim for damages involved in this action was submitted to arbitrators, and an award made, as averred in the answer; and that the award

and the agreement to submit were at once delivered to and retained by the attorney of the appellee. Some controversy was made over the question of a tender to the appellee, and there is some conflict in the evidence upon that subject, but there is no controversy over the fact that the appellee is a non-resident of the state, and that the amount of the award was tendered to his attorney before the commencement of this suit. In our opinion, the verdict of the jury is not supported by the evidence. Judgment reversed, with directions to grant a new trial.

NEW YORK, SUSQUEHANNA & WESTERN R. CO.

v.

TRIMMER.

(*New Jersey Supreme Court, November 11, 1890.*)

Ejectment—Power to Maintain for Lands Condemned.—A railroad company may maintain ejectment for lands condemned for its use under the New Jersey General Railroad Act.

CASE certified from Warren County Circuit Court.

John W. Taylor, for plaintiff.

Wm. H. Morrow, for defendant.

BEASLEY, C. J.—The single question to be decided in this case is whether an action of ejectment will lie on the part of a railroad company for lands condemned by commissioners for its use by force of the provision for that purpose contained in the general railroad act. Question presented. This inquiry seems to be one of first impression. It is certainly such so far as this court is concerned. The objection to the present form of action is that the railroad company, the plaintiff, has "not title to the premises in question, but only an easement in them;" and it is insisted that it is entirely settled that ejectment will not lie founded on such a right. There can be no doubt that the rule that ejectment is not the appropriate remedy when the enjoyment of an easement is the subject of suit has been often stated and is in no wise questionable. Ejectment for easement. But the interest in the lands now in question is not an easement. In cases of easements there must be not only a servient tenement, but also a dominant one, and which latter constituent is entirely lacking in the present instance. A right of way to constitute an easement must be beneficial to other land not owned by the proprietor of the premises burdened. It follows, there-

fore, that the rule appealed to by the counsel of the defendant can be of no avail, unless it can be shown that the reason that occasioned it is applicable to the right in this land that is vested in the plaintiff. The action of ejectment is, and long has been, the legal mode whereby a person having the right in law to the immediate possession of land from which he is kept, enforces such right. It is a possessory remedy and can be resorted to only when a right of entry exists, and where the thing or interest is tangible, so that possession can be given by the sheriff. It is manifest, therefore, that if the interest of the railroad company in these premises were a naked right of way, it would constitute no such right of possession of the land itself as would sustain this action; for such a right would be an incorporeal one upon which there could be no entry, nor could

Ejectment for
lands con-
demned.

possession of it be given under an *habere facias possessionem*. But, manifestly, such is not the right in this land that is vested in this company, for can it be denied that the corporation has a right to enter upon it, and that a judgment in its favor could be executed by the officer putting it in possession? Unlike the use of a private way that is discontinuous, the use of land condemned by a railroad company is perpetual and continuous; so the latter is likewise necessarily exclusive. This is the doctrine strongly presented in the case of *De Camp v. Hibernia R. Co.*, 47 N. J. Law, 55, for it was there declared that the company, by force of this statutory procedure, could not acquire a qualified right in the lands, the court saying: "The statute only authorizes the taking of lands, and the occupation and use of lands, in the state and condition of lands in the legal sense of that term." A reference to the statute by virtue of which the company has acquired its right in this property will at once make manifest the propriety of the view thus adopted. It is the twelfth section that prescribes the mode to be pursued in case the company cannot agree with the owner of the lands required. Commissioners are to be appointed who are to appraise the land or materials, and to assess the damages. The statute then declares, to use its own language, "and thereupon and on payment, or tender of payment, of the amount awarded as hereinafter provided, the said company is hereby empowered to enter upon, and take possession of, the said lands and materials for the purposes aforesaid, and the said report," etc., "and proof of payment or tender of the amount awarded shall at all times be considered as plenary evidence of the right of any company incorporated under this act to have, hold, use, occupy, possess, and enjoy the said land or materials," etc. There seems to be no reason why this language as it stands in this statute is to be

interpreted differently from what it would be if it were found in a deed from a land-owner to the company, and, in this latter event, it is not probable that a doubt will arise in the mind of any one, as to the company's right to immediately enter upon the lands thus condemned, and to hold them in exclusive possession for the uses of its road. It would appear that it may be truly said that language that would be more apt than this for the creation of those interests in the land that justify the use of an action of ejectment could not readily be found.

It has been repeatedly decided, and is now conclusively settled by the courts of this state, that ejectment will lie to obtain possession of the public highways, and of lands dedicated to public uses. It would be superfluous to refer to the reported cases; and the ground of this train of authority is that, in the lands devoted to such purposes, the public have, from necessity, the right of possession. So far as the principle underlying the subject is concerned, these decisions are in point. It is also proper to say that it is not perceived how it would be possible, if the right to resort to an ejectment be repudiated, a railroad company could obtain possession of the lands that the statute devotes to its use on the high ground of public necessity. Let the plaintiff in this case take judgment.

Release of Right of Way to Railroad—Evidence—Identity of Claim.—At the trial of an action against a railroad corporation, its agreement with the owners of land taken by it respecting damages was in evidence, and their signatures were admitted to be genuine. A release to the corporation of such land, purporting to be made on the same date as the agreement, and to be signed by the same owners, and, for the most part, by the same witnesses, and to be acknowledged on the same day before the same magistrate, was offered in evidence for the purpose of showing that the corporation, if the agreement was carried out, was to take a deed of a strip but four rods wide, which fact was conceded in the course of the trial. *Held*, that the release was sufficiently identified to go to the jury, and if not, an objection to its admission became immaterial. *Westcott v. New York & N. E. R. Co.*, 152 Mass. 465.

Action for Appropriating Land—Ownership—Question of Law and Fact—Instruction.—Where one seeks to recover damages from a railroad company for entering upon and appropriating a strip of land 100 feet wide for railroad purposes, and there is no issue as to the ownership of other land described in the petition, the instruction should be confined to the strip in question. The ownership of the strip is a question of law, but the facts from which such ownership is to be determined should be submitted to the jury. *Brown v. Chicago, B. & K. C. R. Co.*, 101 Mo. 484.

Title by Adverse Possession of Owners Adjoining Right of Way.—In *Brown v. Chicago, B. & K. C. R. Co.*, 101 Mo. 484, it was held that the question whether the owner of land adjoining a right of way, which a railroad company after condemning and grading had abandoned and had exercised no acts of ownership for over ten years, acquires title by adverse possession, depends upon whether he took exclusive possession claiming it as his own, and whether he held it continuously for ten years thereafter and before the company again began to exercise control over it.

Consolidation of Railroads—Title to Land.—In *Cashman v. Brownlee* (Indiana, May 13, 1891), 27 N. E. Rep. 560, it was held that the title to real estate of railroad companies which are consolidated, vests in the new company. COFFEY, J. said: "Mr. Rorer, in his work on Railroads, in discussing the question of consolidation (page 38, vol. 1), says: 'And so the legislature may allow a consolidation of two railroad corporations, by the merger of one into the other, whereby the one so merged loses its corporate existence. Such merger works with it a dissolution, destroys the actual identity of both, but preserves the legal identity of the latter. The company so merged—that is, all its members—pass into and become members of the company into which it is merged. All its corporate privileges and property become vested therein, and all the liabilities of the extinct company become chargeable against the corporation into which it is merged. To the same effect is *Beach, Ry. § 553*. See, also, *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42. In the case of *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283, it was held that a railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed. Such new company also assumes the liabilities of the old companies. *Indianapolis, C. & I. R. Co. v. Jones*, 29 Ind. 465; *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48. We think that the new companies formed by the consolidations set out in the special finding of facts in this case, respectively, succeeded to the real estate in controversy."

Grant of Land to Railroad in Front of Highway Below High Water Line—Extension of Highway Over Land Reclaimed.—In *Central R. Co. of New Jersey v. City of Elizabeth* (New Jersey Sup. Ct., June 8, 1891), 22 Atl. Rep. 47, it appeared that prior to November 12, 1874, there was a public highway extending through the Elizabethtown Point tract to the waters of Arthur's kill, and on that day the state of New Jersey granted to the Central Railroad Company of New Jersey the land below the original high-water line in front of the highway, with all the rights of the state therein. *Held*, that the highway did not thereafter extend below the original high-water line over land artificially reclaimed. *Hoboken, etc., Co. v. Hoboken*, 36 N. J. Law, 540, distinguished, and *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, followed.

CINCINNATI INCLINED PLANE R. CO.

v.

CITY & SUBURBAN TELEGRAPH ASSOCIATION.

(*Ohio Supreme Court, June 2, 1891.*)

Purposes of Streets—Rights of Telephone and Street Railway Companies.—The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and, in that view, new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation.

Electric Street Railway—Disturbance of Telephone System.—The fact that a telephone company acquired and entered upon the exercise of a franchise to erect and maintain its telephone poles and wires upon the streets

of a city prior to the operation of an electric railway thereon, will not give the telephone company, in the use of the streets, a right paramount to the easement of the public to adopt and use the best and most approved mode of travel thereon; and, if the operation of the street railway by electricity as the motive power tends to disturb the working of the telephone system, the remedy of the telephone company will be to readjust its methods to meet the condition created by the introduction of electro-motive power upon the street railway.

Same—Same—Vested Rights of Telephone Company.—Where a telephone company, under authority derived from the statute, places its poles and wires in the streets of a municipality, and, in order to make a complete electric circuit for the transmission of telephonic messages, uses the earth, or what is known as the "ground circuit," for a return current of electricity, and where an electric street railway, afterwards constructed upon the same streets, is operated with the "single trolley overhead system," so called, of which the ground circuit is a constituent part, if the use of the ground circuit in the operation of the street railway interferes with telephone communication, the telephone company, as against the street railway, will not have a vested interest and exclusive right in and to the use of the ground circuit as a part of the telephone system.

ERROR to Superior Court of Cincinnati.

The original action was commenced in the superior court of Cincinnati by the City & Suburban Telegraph Association, defendant in error, against the Cincinnati Inclined Plane Railway Company, plaintiff in error. The petition filed was as follows:

"The plaintiff says that it is an association incorporated under the laws of Ohio, for the purpose of constructing, maintaining, and operating telegraph and telephone lines in said state and elsewhere, and has its principal office and business in the city of Cincinnati, where it is now, and has for more than ten years past been, conducting a telephone business, by means of wires stretched upon poles lawfully placed and maintained in the streets pursuant to the statutes made for that purpose, and under the direction of the authorities of said city. Said wires are connected with and terminate at the several 'exchanges' owned by the plaintiff in said city and vicinity. At the 'exchanges' the wires are so arranged, by means of a device for that purpose, that any one of them can be immediately connected with any other. Each wire also terminates in the office, store, room, place of business, or residence of some person, firm, or company; a subscriber to this association paying an annual sum for the use of the telephone, and the service in connection therewith. Each of such subscribers can, by the use of the telephone and other patented inventions of which the plaintiff is the sole licensee in the territory where it transacts business, immediately communicate with and speak to an operator in an 'exchange,' and said operator can, and if requested does, forthwith connect such subscriber's wire with that of any other subscriber

named, so that the two may converse directly with each other. Such communication is effected by means of a slight but continuous electric current passing over the wire from the speaker to the hearer, and, unless interrupted or interfered with, is easily and quickly made. Plaintiff says that many thousand such communications are daily made between persons in all parts of said city, and in the county of Hamilton; that all the principal offices, business houses, newspaper offices, hotels, and other places of resort, and many residences in said county, are thus connected together and brought into communication. Plaintiff says that it has over three thousand such subscribers in the city and vicinity, and that its lines also extend to and connect all the villages for many miles around said city, and hundreds of communications are daily made over the last-named lines, for each of which a small sum is paid plaintiff by the person sending the same; that the whole constitutes a business of value to the plaintiff, and important to the public. Plaintiff further says that the defendant is a corporation under the laws of Ohio, engaged in the maintenance and operation of an inclined plane railway in the city of Cincinnati, and claims to own, and is now in possession of, the street-railway tracks of what is generally known as the 'Mt. Auburn Street Railway,' which, beginning at the corner of Fifth and Walnut streets in said city, extends thence, by single track, on Fifth to Main street; thence on Main, by single track, to Court street; thence on Main, by double track, to Mulberry street, where it connects with said inclined plane railway, also extending from the north end of said inclined plane railway, by double track on Locust and Mason streets, Auburn avenue, and Vine street, to the Carthage turnpike and the Zoological Garden; also on Court street, by single track, from Main to Walnut street, and on Walnut street, by single track, to Fifth street, to place of beginning. Plaintiff further says, that said defendant claims to own and control said tracks by virtue of an assignment or transfer of the same from other parties or companies; but plaintiff is not informed as to said transfers, or the validity thereof, and does not admit that the same or any of them, are lawful or valid. But plaintiff says that the said tracks were originally constructed by the parties under whom defendant claims, under alleged grants from the city of Cincinnati, which provided that 'no motive power, except horses or mules, shall be used on said tracks,' and the same have never been altered or amended in that respect, and the defendant has never acquired from the state of Ohio, or the city of Cincinnati, any right to erect and maintain poles or wires in the streets aforesaid, or to use electricity as a motive power for its cars.

" Plaintiff further says that, since the defendant came into possession of said street railway, it has, within six months last past, and without any lawful authority so to do, caused a line of iron poles to be erected on each side of all the streets where said tracts are situated as aforesaid, and placed upon the said poles large wires, which it keeps constantly charged with powerful currents of electricity, generated by large steam-engines and dynamos owned and operated by defendant for that purpose, by means whereof the cars upon all parts of the tract aforesaid are run and operated from six o'clock in the morning until twelve o'clock at night of each and every day. Plaintiff further says that the defendant claims to have secured authority from the commissioners of Hamilton county to extend tracks along and upon the Carthage turnpike to be operated by electricity, as aforesaid, from the existing tracks to the village of Carthage, and will place thereon poles and wires, and, unless restrained by order of this court, will proceed to run and operate street cars thereon in the same manner that it is now running and operating them upon existing tracks. Plaintiff further says that, ever since defendant commenced the operation of its cars by electricity, it has caused, and is still causing, great damage and injury to plaintiff by creating electric currents and noises upon plaintiff's telephone wires, many of which are and have been, for a period long prior to the use of electricity by defendant, located upon each and all the streets aforesaid, and upon the Carthage turnpike. By reason of the proximity of the defendant's poles and wires to those of plaintiff, and of the powerful currents used by the defendant, together with its mode of use and manner of construction, currents of electricity are transmitted to, or induced upon, the wires of plaintiff, such as to render them useless for telephonic purposes. The noises produced by defendant's operations are loud and continuous, so as to prevent communication by telephone, and the connection of many of plaintiff's subscribers, with the exchanges and with each other, has been thereby interrupted, and broken up, and some of said subscribers have ordered their telephones removed, and canceled subscriptions, while others have only been restrained from so doing by the representations of plaintiff's officers that steps would be taken to induce or compel defendant to remedy the evil. Plaintiff has received, and is receiving, a multitude of complaints from subscribers whose lines are affected by defendant's operation, and numerous notices that, unless the difficulty is remedied, the telephones of the complaining subscribers must be removed. Plaintiff further says that as soon as the defendant began the operation of cars by electricity, and the consequent injury to its

(plaintiff's) plant and business, defendant was notified thereof, and requested to remedy the same, and has since been repeatedly urged to do so, but up to the present time has failed and refused to apply or attempt to apply, any remedy, or take any step to prevent the injury to plaintiff aforesaid, which plaintiff is informed and believes can be done by defendant without any great expenditure of money, and without giving up the use of electricity as a motive power for its cars. Plaintiff asserts that great injury has been caused, and great and irreparable injury will be caused to it by the continued operation of cars by defendant, as it is now, and has been heretofore, operating the same. The plaintiff's lines and telephones in the vicinity of said street railway will be rendered useless, the revenue received from the subscribers thereof cut off, and the business of the company greatly reduced. Wherefore the plaintiff prays that defendant be temporarily enjoined from constructing and operating an electric railway on the Carthage turnpike, of the sort that it is now using, or of any sort that will interfere with or injure plaintiff's lines or business; that, on final hearing, said injunction be made perpetual, and the defendant further restrained from operating any of its cars by means of electricity, in the manner it is now operating the same, or in any manner that may interfere with or injure plaintiff's business. That the damages already suffered by the plaintiff be assessed and ordered paid by defendant, and for such other and further relief as the nature of the case and equity may require."

To this petition the defendant filed an answer, in which, among its averments and denials, the defendant denies that the plaintiff is an association incorporated under the laws of the state of Ohio, for the purpose of constructing, maintaining, and operating telephone lines in said state; and denies that the plaintiff's telephone poles and telephone wires are lawfully maintained in the streets and highways, pursuant to the statutes made for that purpose, or under the direction of the authorities of the city of Cincinnati; and alleges that the plaintiff exercises the powers of a telephone company, and maintains its poles and wires without any lawful authority whatever. The answer avers that, under and by reason of the ordinances, grants, laws, leases, and resolutions therein mentioned, it rightfully and lawfully maintains, controls, and operates, by the electric system known as the "Sprague single trolley overhead system," all its lines of road described in the plaintiff's petition. The defendant, answering, says that it is not liable to the plaintiff in any form of action, whether in law or equity, for the alleged interferences and disturbances, as set forth in the petition; and denies that there is

anything in any of the laws of this state, or in any pretended grant to the plaintiff, which gives to the plaintiff the right to use the earth at all, much less the exclusive right to use the earth, for its return circuit. On the contrary, the defendant denies that the authorities which made any pretended grant to the plaintiff knew that the plaintiff intended to use the earth at all for its return circuit, or would so construct its line; and further denies the claim set up by the petition to the exclusive use of the earth by the plaintiff, because of the vagueness of said claim. The defendant, further answering, says that the plaintiff, if undisturbed by the electrical current from the dynamos of the defendant, will be compelled to resort to other than a grounded circuit in order to give efficient service to its patrons; that the uniform and slight current which the plaintiff claims to be necessary to the successful operation of the telephone cannot be obtained by the use of the grounded circuit, but may be obtained by constructing the telephone either with a complete metallic circuit, or by resort to what is known as the McCluer device; that, whereas, instead of being injured by abandoning the ground circuit and resorting to the metallic circuit, or the McCluer device, the plaintiff will be actually benefited in its service to its patrons, while the defendant cannot abandon its use of the ground circuit without injury to its railroad and to its patrons; that the defendant could not alter its plan of electrical propulsion so as to have a metallic circuit; that such a change is impracticable, would involve a very large outlay, necessitate an overhead structure of double or treble the cost of that now used, and very unsightly, and after it is constructed it would not be successful; that such a system has been tried, and found to be a financial and commercial failure, and in its effect as annoying and disturbing as the Sprague system, under which the defendant is now operating. The defendant, further answering, denies that the noises produced by its operations are loud and continuous, so as to prevent communication by telephone, and that the connection of many of the plaintiff's subscribers with the exchange and with each other has been thereby interrupted and broken up. It denies that the plaintiff has received and is receiving a multitude of complaints from subscribers whose lines are affected by defendant's operations, and also numerous notices that, unless the difficulty is remedied, the telephones of the complaining subscribers must be removed. It denies that great injury has been caused, and great and irreparable injury will be caused, to the plaintiff by the continued operation of cars by defendant, as it is now and has been heretofore operating the same. It denies that the plaintiff's lines and telephones in the vicin-

ity of said street railway will be rendered useless, the revenue received from the subscribers therefor cut off, and the business of the plaintiff greatly reduced.

The plaintiff for reply denied each and every allegation contained in the answer, except such as admitted allegations of the petition.

The action came on to be heard at a special term of the court held in February, 1890, and, neither party demanding a jury, the cause was heard and tried by the court upon the pleadings and evidence; and thereupon the court made a finding of facts, and stated its conclusions of law upon the facts so found, and rendered a judgment and decree thereon in favor of the telegraph association against the railway company, as follows: "This cause coming on to be heard upon the pleadings and the evidence, and having been fully argued by counsel and submitted to the court without intervention of a jury, the court, upon consideration thereof, finds that plaintiff lawfully maintains telephone lines upon the streets named in the petition, and upon the Carthage turnpike, and has so maintained the same ever since a time long prior to the introduction of electro-motive power upon the street railway of defendant, and that said telephone lines are maintained and operated in the manner set forth in the petition; that defendant began the operation of cars by means of electro-motive power upon the street railway on the — day of June, 1889; and by reason thereof, and especially of the manner in which the electric current is permitted to pass from the wheels of defendant's cars into the rails and thence into the earth, great injury has been and continues to be inflicted upon the plaintiff in the manner described in the petition, and that great and irreparable injury will be inflicted upon the plaintiff by the continued operation of defendant's cars, in the manner in which they are now operated and will continue to be operated, unless restrained by the order of this court, and that plaintiff has no adequate remedy at law for said injury. The court further finds that there is a mode of operating street cars by electro-motive power, by means of the double trolley, available to the defendant, the use of which will avoid and prevent the injury to the plaintiff above mentioned. As matter of law, the court concludes that defendant is bound to adopt some mode of propelling its cars other than the one which inflicts the said injury upon the plaintiff, to which finding and decision of the court the defendant excepted at the time the same was made, and moved the court to set the same aside and grant it a new trial: (1) Because the finding and decision of the court is not sustained by sufficient evidence, but is against the weight of the same.

(2) because the finding and decision of the court is contrary to law. Which said motion the court overruled, to which ruling the defendant, at the time the same was made, excepted, and presented to the court its bill of exceptions herein, (embodying all the testimony, evidence, and exhibits offered by either party upon the trial of the action,) which, being found by the court to be true, is allowed and signed, and on motion is hereby made part of the record of the case; and thereupon the court orders, adjudges, and decrees that the said defendant company be, and it is hereby, perpetually restrained and enjoined from operating any car or cars upon the street railway tracks mentioned in the petition, or any of them, or upon any tracks laid or to be laid upon the Carthage turnpike, by means of electric currents passing from a wheel or wheels of such car or cars into the rails of such track, or any of them, or by means of electric currents, the whole or any part of which may be knowingly permitted to pass into the earth, or for which the earth constitutes any part of the conducting medium, in such manner as to cause injury to the plaintiff, to all of which defendant excepts. It is further ordered that the operation of this decree be, and it is hereby, stayed for the period of six months from date hereof, with liberty upon the part of the defendant to apply for an extension of said time."

The court appointed a special master, with directions that he ascertain and report the amount of damages, in money, theretofore sustained by the telegraph association, and hear evidence for that purpose, and report to the court. Upon petition in error, the superior court, at general term, affirmed the judgment and decree of the court at special term. By the present proceeding in error this court is asked by the railway company to reverse the judgment of the superior court at general term, and to render such judgment as the court below should have rendered. Further facts disclosed by the record, and undisputed, are stated in the opinion.

John S. Wise, E. A. Ferguson, and R. A. Harrison, for plaintiff in error.

Aaron F. Perry, Peck & Shaffer, and Selwyn N. Owen, for defendant in error.

DICKMAN, J.—The Cincinnati Inclined Plane Railway Company was incorporated in the year 1871, under the act of May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the state of Ohio." On March 30, 1877, the legislature passed an act authorizing any inclined plane railway or railroad company, theretofore or thereafter organized under the act of 1852, to hold, lease, or purchase, and

Further
statement.

maintain and operate, such portion of any street railroad leading to or connected with the inclined plane as might be necessary for the convenient dispatch of its business, upon the same terms and conditions on which it held, maintained, and operated its inclined plane; "provided, that no other motive power than animals shall be used on the public highways occupied by such street railway company without the consent of the board of public works in any city having such board, and the common council, or the public authority or company having charge or owning any other highway in which such street railroad may be laid."

In September, 1885, the Cincinnati Board of public works adopted a resolution, consenting "to the use either of electricity, cable, or compressed air, as a motive power, by the Cincinnati Inclined Plane Railway Company upon the highways in which the street railroads, connected with its inclined plane, and held and operated by it, are laid." In October, 1888, the railway company, setting forth the resolution giving such consent, and stating that it had decided to use electricity as a motive power on its road, made application to the board of public affairs—the legally constituted successor of the board of public works—for permission to erect, along the entire length of its road, the poles, wires, and other appliances necessary to operate and maintain its entire line from Fifth and Walnut streets to the Zoological Garden, as an electric road. And thereupon the board of public affairs, acting under authority of the act of March 30, 1877, and in furtherance of the grant made by the board of public works, granted the application of the railway company, upon the following condition: "(1) The poles to be made of iron of the size and pattern, and the wires to be strung in the manner as shown on the plan submitted to this board and hereby approved." In February, 1889, in accordance with the provisions of section 3306 of the Revised Statutes, the stockholders of the railway company extended the northern terminus of its road at the Zoological Garden to the village of Glendale. And in March, 1889, the board of county commissioners of Hamilton county, by resolution, granted the application of the railway company to use and occupy the Carthage turnpike to its northern terminus, by double tracks, and with necessary appendages and appurtenances of an overhead electric railroad system, so as to enable the company to permit continuous, rapid, and safe transportation between Fountain square, in Cincinnati, and the village of Carthage. A provision in the grant provided for the removal by the county commissioners of any and all telegraph and telephone poles which might interfere with the

operation of the electric road. This provision, however, was afterwards modified by the action of the commissioners, so as to locate the telegraph and telephone poles at the curb line.

The plan submitted to and approved by the board of public affairs is known as the "Sprague single trolley overhead system." Under the supervision of the engineer of the board, the poles were erected and wires strung; and about the beginning of June, 1889, the railway company had put its street railway in operation under that system, as far as the Zoological Garden; and at the commencement of the original action was engaged in constructing its extension along the Carthage pike, under the grant of the county commissioners, with the necessary appendages and appurtenances of the single trolley system. In the Sprague system, the electricity used to operate the motors under the cars is conveyed to them by a single overhead trolley wire, and a single arm or pole attached to the car, and carrying a contact wheel which runs along and passes up underneath the trolley wire. The current passes down the pole or arm to the switch apparatus on board the car, through the motors, thence to the wheels, and to the tracks. It then passes back to the station along the iron rails of the track, interlaced together by conducting wires, and finally connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return current. Some portions of such current, however, are unavoidably diverted through whatever conductors are in proximity, and which themselves have grounded circuits, but generally returning to the source in which it originated, by means of the metallic ground connection of the rails as extended by the wire to the dynamo. The single trolley system is in use on nine-tenths of the railroads in the United States using electricity. As compared with the double trolley method it is deemed more simple, less liable to disarrangement, much cheaper, and not liable to accidents which would blockade the cars. It has proved successful, and its general adoption, with full knowledge of the double trolley method, furnishes strong proof that it is the most approved system. And, in the finding of facts by the court at general term, there is nothing in disparagement of the single trolley system in itself, but it is held objectionable because it includes the grounded circuit, which the defendant in error has adopted, and claims a monopoly of its use as against the railway company, as an essential part of its telephonic system. It is evident, therefore, that the railway company derived from the legislature the right to use on its road other motive power than

Plan of railway—Single trolley system.

animals; that it acquired the franchise of using electro-motive power; and, eliminating from view the telegraph association, it is making lawful use of such franchise, in a manner authorized by the statute.

The City & Suburban Telegraph Association was incorporated July 1, 1873, as a telegraph company, with lines extending from Cincinnati to Hamilton, in Butler county, under laws since embodied in the chapter of the Revised Statutes regulating "Magnetic Telegraph Companies," and containing section 3454, which provides: "A magnetic telegraph company, heretofore or hereafter created, may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road." In 1878, the telegraph association became the licensee of the American Bell Telephone Company, with the exclusive right to use all its patents in Cincinnati and certain territory adjacent thereto, and, although organized as a telegraph company, entered upon the business of a telephone company. After obtaining the license to use the telephone, the telegraph association erected poles and wires upon the streets wherein the railway of the plaintiff in error is situated, and which was then being operated as a horse railway. These poles and wires were mainly erected in the years 1881 and 1882. But prior thereto, in 1880, the following section was added to the telegraph law: "Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies." But, without this section making the provisions of the chapter relating to telegraph companies expressly applicable to telephone companies, we think that the term "telegraph," as a mode of transmitting messages or other communications, is sufficiently comprehensive to embrace the telephone. It is thus apparent that, while the telegraph association was organized after the incorporation of the railway company, it had planted its poles, and strung its wires, and entered upon the business of a telephone company before the railway company had put its street railway into operation with electricity as the motive power; that permission in due form of law, was granted to the telegraph association to place and maintain its poles and wires for the purpose of supplying telephonic communication to its subscribers in Cincinnati and vicinity, and also as a means of communication for its longer lines.

Telegraph
company.—
Priority in
use of streets.

But it is urged that the franchise of the telegraph association to construct lines of telephone is greatly impaired by reason of the single trolley railway using a grounded circuit, whereby a large part of the electric current flows off from the rails to the surrounding earth, and to and upon all telephone wires which may be connected with the earth in proximity to the railway. The action is described as "conduction," causing more or less of electric current to be poured into the earth, and into all electric conductors connected with the earth, thereby reaching telephone wires in a grounded circuit, and creating loud and continuous noises upon the wires, which disturb telephonic communication. This disturbance, however, results not solely from the earth circuit of the railway company, but also from the fact that the defendant in error likewise relies upon the earth for its return circuit, by connecting with the earth the end of its wire furthest from its electric batteries. The telephone wires are carried from the phones of subscribers to the gas pipes in the rooms where the phones are located, or to water-pipes, or to the earth, in order to make a complete circuit. The interference, moreover, with the operation of the telephone, is said to be largely attributable to the delicate mechanism of the telephone wires and phones. The wires, being designed to carry the extremely small current needed for telephone transmission, are too small in size to carry successfully the strong current passing into them from electric railways. It is claimed that, in addition to this conduction or leakage disturbance, the single trolley electric railway introduces serious disturbances on telephone lines by induction, for the reason that such electric railways employ large wires to convey the current used for the propulsion of their cars, and this current is constantly and rapidly changing its strength; that these rapidly changing currents in the electric railway wires induce disturbing currents in parallel telephone wires near which the electric railways have been built, and thus prevent a successful transmission of telephonic messages.

Disturbance
of telegraph
system.

These interferences with the telephone service may be obviated, it is stated, by the railway company giving up the single trolley system with the ground circuit, and substituting the double trolley system with its two trolley wires, two trolley wheels and electric current passing from one wire through one trolley, through the motor, back through the other trolley to the other wire, and so back to the generator, without escaping to the earth. The grounded circuit, it is insisted, should be abandoned and surrendered to the sole use and service of the

Methods of
obviating in-
terference.

defendant in error. But it is admitted, that other remedies of the telephone disturbances may be easily obtained by constructing the telephone with a complete metallic circuit, or by resort to what is known as the "McCluer device," consisting of a single return wire, to which a number of telephone wires are attached.

Conceding that the mode adopted by the railway company of propelling its cars by electricity is an interruption to the telephone service of the defendant in error, and calculated to impair its franchise in the manner contended, the inquiry is suggested whether the railway company must yield up a useful franchise, that the same may be exclusively enjoyed by the telegraph association, or whether the association shall adapt its system to existing conditions; whether the company shall change from the single to the double trolley system, from the grounded to the metallic circuit, or whether the association shall use either a complete metallic circuit, or resort to the McCluer device. It is immaterial on which party the expense of the change may fall the more heavily. It is a question of legal right, and as remarked by Lord HATHERLEY, L. C., in *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 153, "the simplest course, as far as regards the administration of justice, is to ascertain the exact state of the law which regulates the relations of the parties; and, having done so, to proceed to act on it, without any reference to the difficulties of the case on the part of those against whom it is obliged to decide; leaving those parties to relieve themselves as they best can from the position in which they have placed themselves, and, if there be no other mode of escape, to cease to do the acts which occasion the wrong."

When the telegraph association erected its poles and lines in 1881 and 1882, with the design of conducting the business of a telephone company, it found the railway company operating its street railway, with authority under the statute to use other motive power than animals, to-wit, electricity, cable, or compressed air, upon obtaining the consent of the board of public works. The telephone business was not among the probabilities when the streets of Cincinnati, now made use of by the telegraph association, were dedicated or condemned for the public use. The primary and dominant purpose of their establishment was to facilitate travel and transportation; they belong from side to side and end to end to the public, that the public may enjoy the right of travelling and transporting their goods over them. The telephone poles and wires, and other appliances, are not among the original and primary ob-

Question presented.

Purposes of streets—Use for telephone poles.

jects for which streets are opened, for they may be placed elsewhere than on the highways, and yet accomplish their purpose. In *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 43 Am. & Eng. R. Cas. 208, it was said by DUFFEE, C. J., that telephone poles and wires are not used to facilitate the use of the streets for travel and transportation, "whereas, the poles and wires of the railway company are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled." As a general rule, an occupation of the streets, otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public for highway purposes, for, if not so, the primary object of their dedication or appropriation might be largely defeated; and the fact that permission is granted to occupy the streets or highways for a purpose other than travel does not confer a prior and paramount right to occupy them, to the exclusion of their use for travel in a mode different from what obtained when such permission was given. The main purpose of streets or highways being to facilitate travel and transportation, new and improved agencies for effecting that purpose must be presumed to have been in contemplation, in addition to those in existence when the ways were established. To those improved agencies, devised for the convenience and advantage of the community in general, the franchise of the telephone company to occupy the streets for carrying on its business, must be secondary and subordinate. "The use of a highway for the purposes of a street railroad involves the application of new appliances and modes of travel, rather than of any new principle. In both, a corporation is employed and invested with rights in the highway; in both, an expenditure of money is required to put the road in a condition for use and to keep it in repair; but in both the great leading object and public benefit is the accommodation of travellers, who may have occasion to use them at fixed tolls or rates of fare, and not the profit of the proprietors." *RANNEY, J.*, in *Cincinnati & S. P. Ave. St. R. Co. v. Cumminsville*, 14 Ohio St. 523, 545.

Dominant easement is for purpose of travel.

In the case *Hudson River Tel. Co. v. Watervleit T. & R. Co.*, 121 N. Y. 397, the right of the telephone company to enjoin the railroad company from operating its road by electricity, under the single trolley system, incidentally came under consideration. In delivering the opinion of the court, *ANDREWS, J.*, after stating that the use of a grounded circuit is not necessary to a telephone system, and that the substitution of the metallic for the earth circuit, besides obviating

Hudson River Tel. Co. v. Watervleit T. & R. Co.

the disturbance caused by the defendant's road, would promote the general efficiency of the telephone service, says: "The plaintiff is but one of a large number of telephone companies which, under the general permission of the statute for the incorporation of telegraph companies, have erected poles and strung their wires in the streets of the cities and villages of the state. The claim that under this permissive grant they can exclude the use of the streets by electric railways, or for other street purposes requiring the use of electricity, wherever the use of this agent interferes with the use of the telephone, although the municipality may consent and the public interest will be promoted by the other uses to which the streets are sought to be subjected, needs but to be stated to induce hesitation." In the last entitled case, the telephone company erected poles for its wires, and perfected its system of telephone communication, several years before the railroad company substituted electricity in place of horsepower for the movement of its cars.

The authority given by statute to a telephone company to construct its lines from point to point, along and upon any public road, under the continuing prohibition that "the same shall not incommode the public in the use of such road," would plainly indicate an intention on the part of the legislature that the company shall exercise such franchise, with reference to the comfort and convenience of the travelling public, and shall not, in any manner, abridge or impair the use, by the public, of the most approved methods of travel and transportation. And a reasonable interpretation of the statute would lead to the conclusion that to impair the public enjoyment of an approved method of conveyance on the streets would be in derogation of the statutory prohibition that the public shall not be incommoded in the use of the roads or highways. The statutory permission to the telegraph association to construct its telephone lines along and upon the highways was not, therefore, without qualification. But, whether the legislature had or had not imposed the condition that the public should not be incommoded, the association, in our judgment, acquired its privilege or permissive grant, subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines, as not to curtail the enjoyment by the public of the best modes of travel and transportation upon the streets. Whether all who go on the streets shall have the most convenient and expeditious passage and carriage of person and goods has not been made dependent upon the manner in which the defendant in error has preferred to locate its

Statutory
limitations on
authority of
telephone
company.

poles, stretch its telephone wires, or form the electric circuit.

It is in recognition and maintenance of the superior easement of the public in the streets that city councils are required to "cause the same to be kept open and in repair, and free from nuisance;" that the streets are graded and paved, and proper regulations of police provided to govern the actions of persons using them; that the abutting owner, though having a peculiar interest and easement in the adjacent street, appendant to his lot, has no right to place permanent obstructions in the street, nor do any act on his own land, outside the limits of the street, that will make the way inconvenient or hazardous, or less secure than it was left by the municipal authorities. *Crawford v. Delaware*, 7 Ohio St. 459; *Elliott, Roads & S.* 311; *Mallory v. Griffey*, 85 Pa. St. 275; *Milburn v. Fowler*, 27 Hun, 568; *Dill. Mun. Corp.* § 1032, and cases there cited. In *King v. Russell*, 6 East, 427, the right of the owner to load and unload his wagons in the highway before his warehouse, was held to be entirely subordinate to the right of public passage, and must not be exercised in such a manner as unreasonably to abridge or incommode the latter right. The court say: "The primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. If the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." As against the public easement in the highway, a telephone company that obtains the naked permission to locate its poles and wires along the streets should, we think, stand on no higher vantage ground than the owners of property abutting on the streets, who hold or acquire their property subject to all the consequences which may result, advantageously or otherwise, from any public and authorized use of the streets, in any mode promotive of, and consistent with the purposes of, establishing them as common highways.

This paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telegraph or telephone when admitted on the highway, without the clearest expression of the legislative will. In *Hickok v. Hine*, 23 Ohio St. 523, it was held that, when the legislature has pow-

Superior easement of right of travel not to be made subservient.

er to require one public easement to yield to another more important,—*a fortiori* where the other is inferior,—the intention to grant such power must appear by express words, or by necessary implication; and such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. We fail to discover any authority, either express or implied, to subordinate the public easement in the streets to the privileges exercised thereon by the telegraph association, under the general terms of the statute permitting the erection of posts, piers, and abutments necessary for its telephone wires, and especially when coupled with the condition that the same shall not incommode the public in the use of the highway.

The demand made by the telegraph association is not that the railway company shall so modify its existing electrical apparatus as not to interfere with the telephone service, but shall forever abandon the use of an essential part of its electro-motive system, or be perpetually enjoined. In other words, the association claims the exclusive use of the grounded circuit, inasmuch as the mechanism of the telephone is so complex, and the electric currents employed so delicate and sensitive, that they cannot be used without disturbance from the heavier currents employed by neighboring electrical enterprises that operate with the grounded circuit. We find no foundation for such an exclusive franchise or right. When the telegraph association began its operation under the telephone system, neither the statute authorizing it to erect and maintain poles, wires, and other necessary fixtures, nor the ordinance under which it obtained the power to extend its lines in the streets, gave an exclusive right either to use the earth for a return circuit, or a complete metallic circuit formed by double wires. The legislature did not grant the right by general enactment, nor was the municipal corporation empowered by the legislature to give the telegraph association the exclusive right to make use of its streets so as to create a monopoly. In *State v. Cincinnati Gas-Light & Coke Co.*, 18 Ohio St. 262, it was held that a municipal corporation cannot, without clear legislative authority, grant an exclusive right to the use of the streets for certain purposes to an individual or corporation. To enable it to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted, or to be so far necessary to the proper execution of the powers which are expressly granted as to make its existence free from doubt.

No foundation
for demand of
telegraph
company.

In the year 1838, Prof. Steinheil made the important discovery of the practicability of using the earth as one-half or the returning section of an electric circuit. Prof. Morse claimed to have made the discovery about the same time, but he failed to obtain a patent therefor. It was the discovery of an elementary principle of science, of a truth in physics, of a law in the operation of the forces of nature, and was not bounded by the trammels of the patent law. For 40 years before the telephone was discovered, the use of the earth as a conducting medium, in the formation of an electric circuit, had been the common property of any electric enterprise. By what grant or title, then, did it become the especial, peculiar, and exclusive franchise of the telegraph association? As it did not originate in legislative or municipal grant, so such exclusive franchise did not spring from priority in its exercise. Where a right is common and universal, and capable of being exercised by all at the same time, there is no applicability of the rule that he who in its enjoyment is prior in point of time is prior in right. He who is first in the field does not thereby gain a monopoly of use.

Use of earth
for return
current.

It is contended, however, that the defendant in error, by virtue of its grants, acquired, before the railway company had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the legislature of the state could take away from it or injure this franchise, on the faith of which it has expended its capital and labor. Special privileges or immunities are under the control of the legislature. If granted, they may be altered, revoked, or repealed, by the general assembly. Art. 1, § 2, of the constitution. And, while corporations with valuable franchises may be formed under general laws, all such laws may, from time to time, be altered or repealed. Const. art. 13, § 2. In view of these constitutional provisions, it is clearly within the power of the general assembly to authorize one class of corporations to use in the streets electricity with the grounded circuit, as a motive power, and another class to employ the same or a similar agency for the transmission of telegraphic or telephonic messages. And, if the proper exercise of the rights granted to the one class, under general law, is irreconcilable, and plainly interferes with a prior grant to a corporation of the other class, it may be construed as the intention of the legislature to deny an exclusive franchise, if not to repeal the antecedent grant.

Prior grants
to telegraph
company not a
vested right.

In view of the special benefit conferred by the grant of

corporate power, it is evident that the primary object or design of the state in granting the franchises of telegraph and telephone companies is, in a large measure, to subserve the public benefit and convenience, and not the mere pecuniary advantage of the owners of the corporate property. The exercise of their corporate privileges is subordinate to the accommodation of those who travel on the streets or highways,—“the profit to the proprietors being a mere mode of compensating them for their outlay of capital in providing and keeping up the public easement.” SHAW, C. J., in *Com. v. Temple*, 14 Gray (Mass.), 69, 77. “It is in contemplation of such companies being thus subservient to the promotion of the public convenience and welfare that the legislature has granted to them the privilege, among others, of exercising the power of eminent domain, by entering upon any land, and appropriating so much thereof as may be deemed necessary for the erection and maintenance of poles, piers, abutments, wires, and other necessary fixtures.

Having received their corporate franchises from the state, they hold them in implied trust for the benefit of the community at large, and subject to the constitutional grant of legislative power to control the exercise of those franchises, in the future, as the public good may require. A franchise, if granted by the state with a reservation of a right of repeal, must be regarded as a mere privilege while it is suffered to continue, and the legislature may take it away at any time, and the grantees must rely for the perpetuity and integrity of the franchise granted to them, solely upon the faith of the sovereign grantor. *Pratt v. Brown*, 3 Wis. 603; *Cooley*, Const. Lim. (6th Ed.) 472. But, in the absence of such a reservation, its force and effect may be attained through the constitutional power vested in the general assembly to alter or repeal, from time to time, all general laws under which corporations are formed, and to alter, revoke, or repeal all special privileges or immunities that may have been granted. In illustration of what we have said, is the case of *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.*, 30 Ohio St. 604. In that case the Lake Shore & Michigan Southern Railway Company instituted proceedings to appropriate, for the construction of its railroad, the right and privilege of crossing with its track and way the track and way of the Cincinnati, Sandusky, & Cleveland Railroad Company. It was the decision of the court, as set forth in the syllabus, that every railroad corporation in this state accepts its charter and franchises, and owns and uses its tracks, subject to the power of the state to authorize the construction of other railroads across its tracks

Right of state
to control
franchise.

whenever the public welfare may require. Neither the priority of one charter over the other, nor the prior location or construction of a railroad thereunder, affects this right. Under the constitution and laws of this state, the right of one railroad corporation to cross the track of another, in constructing and operating its road, is derived by grant of the franchise so to do from the state, and not by purchase or appropriation from the road first located and constructed. The latter has no vested exclusive right to such crossing for its use against the right of the public to a crossing. The court further held that the railroad company across whose track a right of way was condemned could not recover for an injury to its franchise as a railroad; and that detention of trains, loss of future business, or additional expenses incident to the future exercise of its corporate powers, could not be taken into the account in estimating consequential damages.

It is contended, however, in behalf of the defendant in error, that, conceding their railway company and the telegraph association to be upon an equal footing on the streets and highways in the enjoyment of their respective franchises, the company is bound to conform to the rule, *sic utere tuo ut alienum non ledas*. In the view which we take of the relation to each other of the parties to the action, we deem it unnecessary to inquire whether there has been a want of conformity, and to what extent, if any, on the part of the railway company, to the requirements of the legal maxim. Nor do we think it necessary to determine how far an incorporated company making a lawful and careful use of its own property, or of a franchise granted to it by the proper municipal authorities, may be held liable for damages incidentally caused to another. From the undisputed facts in the case, as disclosed in the record and printed arguments of counsel, it is evident, as we have already seen, that the railway company acquired from the state, and from the city of Cincinnati, authority to erect and maintain poles and wires in the streets or highways, and to use electricity as a motive power for its cars. Clothed with such authority, we have, upon weighing the allegations in the original petition, and applying to them the well-settled principles governing the legal rights of the public in the highways, reached the conclusion that the facts set forth in the petition are not sufficient to constitute a cause of action. We are of the opinion that there has been no invasion of the rights of the telegraph association by the plaintiff in error, and that the telegraph association is not entitled to the relief prayed for in its petition. The judgment, therefore, of the superior court at general and special term must be reversed, and the original petition dismissed. Judgment accordingly.

Maxim sic
utere tuo.

Electric Street Railways—Interference With Telephone System.—See Cumberland Tel. & Tel. Co. *v.* United Electric R. Co. (C. C.), 43 Am. & Eng. R. Cas. 194. As to interference by electric light wires with wires of telephone company see Nebraska Tel. Co. *v.* York Gas & Electric Light Co. (Neb.), 30 Am. & Eng. Corp. Cas. 547, note 561.

DETROIT CITY R. CO.

v.

MILLS *et al.*

(*Michigan Supreme Court, May 8, 1891.*)

Electric Street Railway—Ultra Vires Corporate Act—Right of Individual to Bring Suit.—Although a city may have no authority to permit a street railway company to operate its cars by electricity, the question cannot be raised collaterally in a controversy between an abutting lot owner and the street railway company as to its right to erect poles in the street. The want of such power is a question between the company and the state. Until the right has been determined by a direct proceeding brought by the state or the city the company may continue the use of electricity as a motive power.

Power of City to Authorize Use of Electricity for Street Railways.—Where the legislature expressly confers upon cities the right to authorize the use of any motive power whatever upon their street railways, a city has the power to authorize a street railway company to use electricity as a motive power, although at the time of the legislative authorization the use of electricity for such a purpose had not been discovered.

Danger in Use of Electricity—Injunction.—The use of electricity as a motive power for propelling street railway cars has not been shown to be so dangerous as to justify the court in enjoining it.

Use of Street for Street Railways—Additional Servitude.—The use of city streets for street railways does not impose such new burden and servitude additional to what was implied by the dedication, as to place it beyond the power of the city authorities to authorize their construction without additional compensation to abutting lot owners; and it is immaterial whether such abutting owners or the city owned the fee in the streets.

Poles in Street—Interference with Access.—The poles to support the wires necessary to the operation of a street railway by electricity are not such an interference with the access to the abutting property as constitutes an invasion of private rights; and it cannot be insisted that they are a detriment because in platting lots and selling them it may be necessary to take them into consideration.

Exclusion of Other Vehicles from Street Occupied by Railway.—It seems that a street railway company cannot lawfully construct and operate its road in a street too narrow to admit the passage of its cars and other vehicles at the same time, nor in a street, although of sufficient width, if its condition be such that the operation of the railway will result in the practical exclusion of others from the street, nor unless its roadbed and track are built substantially with the level of the street so as to permit vehicles to pass without difficulty, nor, if an electric railway, unless the poles are so placed as not to interfere with the right of ingress and egress to abutting property.

Title of Statute Embracing More than One Subject.—The Michigan Act of

1855 relating to "Train Railway Companies" was amended in 1861, 1867, and 1871, by acts authorizing and regulating the operation of such railroads for the carriage of passengers through the streets of cities under municipal regulation. The amendment of 1867 authorized the use of steam or any other power than animal power under the authority of the municipality. *Held*, that it cannot be said that the act is unconstitutional as embracing more than one subject which is not expressed in its title.

Limiting Number of Witnesses—Discretion of Court.—It is within the discretion of the court to limit the number of witnesses who may be called to testify to any particular fact.

MCGRATH and MORSE, JJ., dissenting.

APPEAL from Wayne County Circuit Court.

William Look and F. H. Chipman, (Don M. Dickinson, of counsel,) for appellants.

Brennan & Donnelly and Hoyt Post, for appellee.

GRANT, J.—The complainant was organized in May, 1863, under chapter 94, How. St. It has from time to time extended its tracks, under the direction of the common council upon the streets of the city, until it now has many miles of road and large amounts of money invested. It has, during the 27 years of its existence been engaged in the business of carrying passengers to and from different parts of the city. January 23, 1889, the common council authorized the complainant to lay, construct, use, and operate a single street-railway track in, along, and through Mack street, from its conjunction with Gratiot avenue to the city limits. It fixed the rate of speed at not less than six nor more than ten miles per hour. It also provided that, whenever the complainant should deem it advisable, it might substitute in lieu of animal power such system of electric or other motive power, except steam, as should seem best in its judgment, for the purpose of properly and safely conducting its said business in said city of Detroit upon any or all of its said lines now in use and operated, or hereafter to be used and operated, by said company, and that such change should be made under the supervision of the board of public works. This ordinance was duly accepted by the complainant. Complainant proceeded to construct its track upon Mack street, and concluded to use the system of electric motive power instead of horse power. This system is the same as the one involved in the case of *Potter v. Saginaw Union St. R. Co.*, 83 Mich. 285, (decided at the present term.) The system and the construction of the road are there sufficiently described. Complainant was proceeding to erect its poles upon the side of the street fronting the premises of the defendants, the poles being placed 125 feet apart. The defendants interfered with the construction by cutting down the poles and threat-

ened to continue to do so. The complainant thereupon filed its bill of complaint to restrain this interference on the part of the defendants. The defendants answered, admitting their action, and claiming their legal right to thus prevent the construction of an electric street railway on the street. They allege that street railway cars, propelled by electricity, cannot lawfully be used on the street in the manner intended by complainant. They deny the power of the common council to permit the erection and maintenance of this electrical apparatus without the consent of abutting property owners, or without condemnation proceedings, and claim that the construction and use of this railway limits, impairs, and impedes the use and enjoyment of their property, and imposes an additional servitude upon the street. They also filed a cross-bill praying for a perpetual injunction against the use of such railway. The case was heard upon pleadings and proofs, and decree entered in favor of the complainant, the railway company.

1. The act under which complainant is organized is attacked as unconstitutional and void in that it embraces more than one object which is not expressed in its title. The original act was passed in 1855 under the title of "Train Railway Companies." Its purpose is stated in section 1 as follows: "Any number of persons, not less than three, may be formed into a corporation for the purpose of constructing, owning, and operating a train railway or road, to be operated by horse or other animal power, by complying with the following requirements." The first twelve sections provided for the details of the organization, and for the obtaining of lands, by purchase or condemnation, for its roadway, gates, tollhouses, etc. The next two sections provided for the use of the road by any person, by paying certain tolls for every coal car, ore car, or other vehicle drawn over it. It is unnecessary to mention the provisions of the other sections of the original act. Nothing is said in the act about the carriage of passengers. This act was amended in 1861 by adding two sections providing for the organization of companies under the act to construct and operate railways in and through the streets of any town or city, upon obtaining consent of the municipal authorities, and under such regulations as they might from time to time prescribe. In 1867 three additional sections were added, and in 1871 two, providing additional regulations for the construction and operating of street railways in cities and along the public highways. The amendment of 1867 also provided for the operation of the cars by steam, or any power other than animal power, under the authority of the municipality. The

Constitution-
ality of statute—Title—
One subject.

alleged dual object consists in this, viz., that the original act provided for tollroads for the carriage of freight, while the amendment provided for railways for the transportation of passengers. Street railways have existed under this act for nearly 30 years. Millions of money have been invested in them. They have been extensively used by the people. This complainant has, during its existence, been engaged exclusively in the carriage of passengers. It has become not only a convenience, but a necessity, to the people. In the many cases brought to this court involving the various provisions of the act, its constitutionality was never raised, and is now for the first time doubted. If its constitutionality were doubtful, courts might well be justified in upholding the practical construction which has thus been adopted by the people. The people have acted and invested upon the faith of its validity for the last 27 years, not only in the city of Detroit, but in many other cities of the state, and the state authorities have never questioned it. In construing the constitutionality of a statute, as well as in interpreting a provision of the constitution itself, the practical construction which the people have placed upon it during a series of years will be adopted by the courts, unless there is a clear infraction of some constitutional provision. In such cases the argument *ab inconvenienti* will be allowed to have great weight, *Cooley*, Const. Lim. 81; *Stuart v. Laird*, 1 Cranch, (U. S.) 299; *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.), 304. 351; *Cohens v. Virginia*, 6 Wheat. (U. S.), 264; *Bank v. Halstead*, 10 Wheat. 51; *Westinghausen v. People*, 44 Mich. 265; *People v. Hammond*, 13 Mich. 256; *Frey v. Michie*, 68 Mich. 323, 20 Am. & Eng. Corp. Cas. 129; *People v. Goodwin*, 22 Mich. 500. But upon its merits we see no force in the position. The general purpose of the act is to provide for local railway transportation. Its title is "An act to provide for the construction of train railways." Whatever may be included under the title of an act when passed may also be included by subsequent amendment. The general railroad law is silent in its title as to what may be transported under it, yet no one ever thought to question its validity upon the ground that it provided for the carrying of both freight and passengers. If the provisions of the amendment are germane to the object expressed in the title, this is all that the constitution requires. In determining this question the law must be considered as a whole, as amended. The amendment is incorporated into the original act, and becomes a part of it. The same rule of construction will be applied to the amended act as to the original act. The word "train" as used in this law, is defined to be a "continuous or connected line of cars or carriages on a railroad." Certainly

the carriage of passengers is as germane to the object expressed in the title as is the carriage of freight. Either could be incorporated into the law by amending without violating the constitutional provision. Counsel for the defendants are in error in interpreting the original act to be limited to the carrying of "ore, mineral, copper, and iron." The corporations therein provided for had the right to carry any and all kinds of freight.

2. It is next insisted that the municipality of the city of Detroit does not possess the power to permit the complainant to operate its cars by electricity, and that, therefore, the complainant is acting without authority of law. The precise claim is that chapter 94, How. St. does not authorize the use of this motive power by the companies to be organized under it, but limits them to the use of such powers as were known at the time of the passage of the act and the amendments thereto. Granting this position to be correct, it follows that the action of the complainant is *ultra vires* of the corporation. The obvious and conclusive answer to this claim is that it is a matter between the complainant and the state. The defendants are not in position to raise the question. The mere usurpation of corporate authority does not confer upon the individual the right to bring suit to restrain the unlawful exercise of authority, nor to raise it collaterally. If the state chooses to waive it, or by its silence permit the action, no others can complain, so long as the personal or property rights of the individual are not invaded or affected. It therefore follows that, unless these defendants are injured, they are not concerned in this question. *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 393; *Jones v. Habersham*, 107 U. S. 174; *Newell v. Minneapolis, L. & M. R. Co.*, 35 Minn. 112, 24 Am. & Eng. R. Cas. 298; *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 471; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400. Until the right has been determined in a direct proceeding brought by the state or the city, the complainant may continue the use of such power.

3. It is unnecessary to discuss the proposition that the right of the complainant to use electricity is not conferred by the original act of 1855. By the act of 1867 the right to use any other than animal power was expressly conferred, to be exercised under the authority and direction of the municipal authorities. By the act of 1871, section 1 was amended so as to provide for constructing, owning, and operating a train railway or road for the conveyance of persons or property, to be operated by horse or other animal power, or by steam, or by pneumatic

Ultra vires
act—Collateral
attack.

Right to use
electricity
conferred by
statute.

or any other motive power, or by any combination of them. How. St. §§ 3495, 3533. Upon the authority thus conferred the common council of the city of Detroit passed the ordinance above mentioned. In accepting the ordinance, the complainant accepted the provisions of the law as an amendment to its corporate powers. This would be true if its articles of association described its purpose to be the construction of a horse railroad, as it is stated to be in defendant's brief. The language, however, of the articles is broader than this, for its purpose is declared to be the construction of a horse or city railroad under the act of the legislature above mentioned. The general railroad law enacted in 1855 provides for the use of the force and power of steam, of animals, or any mechanical power or any combination of them. If some new motor (such as a storage battery, which counsel for the defendants in their brief say will no doubt be discovered in the immediate future) should be found to take the place of steam, and thereby dispense with the noise incident thereto, and the discomforts of dirt and smoke, would it be contended that railroad companies could not use it, under the provisions of this law, because it was not known at the time the law was passed? These laws were enacted in times of rapid advancement in the mechanical arts. This advancement is nowhere more forcibly shown than in discovery and use of devices and motors to facilitate travel and transportation. It cannot, in my judgment, be held that the legislature intended to limit these corporations to the use of things that were then known. This rule would be too rigid and technical to merit approval. The common law is more elastic and progressive. It adapts itself to meet the needs of the people, and the advance of science and civilization. As well might it be contended that when land is dedicated to or condemned for the public use for highways its use must be limited to the then known methods of travel and transportation. Engines now travel over nearly every public highway in the agricultural portion of the country, propelled by steam, drawing large machines, and stopping at nearly every farm to facilitate the work of farmers; yet upon this innovation of the use of the highway this same principle was invoked as is now invoked to prevent it. *Macomber v. Nichols*, 34 Mich. 213. In this case the defendant was held liable in the circuit court for running such an engine along the highway. In his opinion, Chief Justice COOLEY says: "Persons making use of horses, as the means of travel or traffic by the highway, have no right therein superior to those who make use of the way in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals, but per-

sons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from existing public roads, provided their use is consistent with the present methods."

Steam has been used as a motor in the public streets, and its use sustained. *Moses v. Pittsburg, Ft. W. & C. R. Co.*, 21 Ill. 516. The court in that case says: "A street is made for the passage of persons and property, and the law cannot define what exclusive means of transportation shall be used. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because the streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present day." See, also, *Fulton v. Short Route Transfer Co.*, 85 Ky. 640; *Stanley v. City of Davenport*, 54 Iowa, 463. The use of electricity causes no greater obstruction or hindrance, and imposes no greater burden, upon the street than does the ordinary horse railway, except it be by placing posts along the streets,—a matter to be hereafter discussed. The electric arc does not occupy as much space upon the street as does the car with the horses attached. It is not more noisy, is cleaner, is started and stopped quicker, moves faster, is more readily controlled, and, by its more rapid carriage of passengers, relieves the street, to some extent, at least, of travel. These are matters of common observation. Its advantages over horse power are apparent. But it is most severely attacked because it is dangerous, and evidence of accidents, caused by it in this and other states, was introduced by the defendants. Some of this evidence, it appears, was used in the courts of other states, where the use of this power was sustained. It has not, however, been shown in this suit to be so dangerous as to justify the court in enjoining its use. The electric railway is now in use in nearly all the large cities and many of the smaller ones of the country. I am not aware that any court has yet enjoined its use on the ground of danger. Steam annually causes the loss of many lives and great destruction of property; yet no one has ever sought for that reason to enjoin its use as a motive power in transportation. This matter may be safely left where the legislature has left it, to the municipal authorities, who presumably will not permit the use of those things which cause unnecessary danger. The legislature has expressly conferred upon the cities of this state the right to authorize the use of any motive power whatever upon their street railways. Under this power exists the

right to authorize the use of electricity. Williams v. City Electric St. R. Co., 41 Fed. Rep. 556, 43 Am. & Eng. R. Cas. 215. Defendant's counsel cited as an authority Omaha Horse Ry. Co. v. Cable Tramway Co., 30 Fed. Rep. 324. The language then used by Judge BREWER must be considered in connection with the facts. The question there involved was not whether a horse railway company might use any other motive power, but whether, being by its charter limited to the use of horse power, it might restrain another company from using any other power. The complainant in that case was given the exclusive right to build, erect, and operate horse railways within the city of Omaha, and five miles adjacent thereto. This was under a special charter from the legislature of the territory of Nebraska. The defendant was proceeding to construct a cable road, and the complainant sought to enjoin its construction and use on the ground that the defendant's road was included in the term "horse railways." In the opinion is this language: "Is it probable that it [the legislature] intended to foreclose the public in advance from all the benefits of possible inventions and discoveries in the matter of street railway travel, and give them to this grantee? or did it not rather intend that its grantee should take that complete and single thing known as a 'horse railway,' with all of which it was familiar, and retain from the public all the unknown possibilities of invention and discovery in reference to modes of street railway travel?" In the present case, under the authority of the legislature, the people are reaping the benefit of just such inventions, the use of which is authorized by the broad and comprehensive language of the act, as was evidently intended.

4. This brings us to the important question, viz., does the use of the street for street railways impose such new burden and servitude, additional to what was implied by the dedication, that it is beyond the power of the city to authorize their construction without additional compensation to abutting lot-owners? As already shown, no restrictions are placed upon the city in granting these franchises. The lot-owner sustains a three-fold relation to the street (1) as one of the general public, (2) as owner of the reversionary interest to the center of the street, and (3) as owner of a lot, possessed of the right of ingress and egress to and from the street. In the first relation he has the right in common with every other member of the public to the use of the street. The fact that vehicles pass along the street upon tracks leveled with the bed of the street, and leaving sufficient room for him to pass on foot or with his vehicle, does not interfere with this right. The fact that

Use of street
for railway—
No additional
burden.

he is compelled to turn aside, when meeting or passing a car upon the track, is an incident to the use of the street, but no infringement of any right possessed by him. He is not thereby hindered, delayed, or obstructed in his passage. Free passage is all the law gives him. In condemning land for the use of streets and highways, the owner receives as damages the full market value of his land. After it has been condemned or dedicated, there is no such thing as damage to his reversionary interest, caused by any use which is a public one. Whatever may have been the ancient adjudications limiting the rights of the public in the streets to passage and repassage, and whatever may now be the rule with regard to highways in the country, with the growth of population in our cities have come increased needs for heating, lighting, draining, sewerage, water, etc., and with these there has come also a corresponding extension of the public rights in the streets. Immense sewers and water mains may be dug, and the soil removed, culverts and drains constructed, without compensating the abutting owners. It may now be considered the well settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it. *Ang. Highw.* 312; *Town of Palatine v. Krueger*, 121 Ill. 72; *Murray v. Commissioners*, 12 Metc. (Mass.), 455; *Pierce v. Drew*, 136 Mass. 75, 8 Am. & Eng. Corp. Cas. 85; *City of Boston v. Richardson*, 13 Allen, (Mass.) 146. So far, then, as these defendants are concerned, it is immaterial whether they or the city own the fee in the street. Their rights are the same in either case. So long as they are unobstructed in the use and enjoyment of their property, having convenient ingress and egress, and the use of the street is an authorized and proper public use, they have no legal cause for complaint. It is evident that street railways, when constructed so as not to interfere with the rights of others upon the street, form no obstruction to such use and enjoyment. They make no more noise than the omnibus or other heavy vehicles, are not more dangerous, and no more interfere with access to the abutting lots. They constitute a modern and improved use only of the street as a public way. These improved methods become necessary in populous cities. The use is the same; the methods only different. Without them, clerks and working men and women could not be provided with cheap and rapid transit from their working places to the suburbs of the city, where they may have cheap and comfortable homes. These views are in accord with the clear weight of authority. *People v. Kerr*, 27 N. Y. 188; *Kellinger v. Forty-Second St., etc. R. Co.*, 50 N. Y. 206; *Mahady v.*

Bushwick R. Co., 91 N. Y. 148, 14 Am. & Eng. R. Cas. 142, Pierce, R. R. 234; Elliott *v.* Fair Haven & W. R. Co., 32 Conn. 579; Hinchman *v.* Paterson Horse R. Co., 17 N. J. Eq. 75; Attorney General *v.* Metropolitan R. Co., 125 Mass. 515; Eichels *v.* Evansville St. R. Co., 78 Ind. 261, 5 Am. & Eng. R. Cas. 274; Hobart *v.* Milwaukee City R. Co., 27 Wis. 194; Brown *v.* Duplessis, 14 La. Ann. 843; Atchison St. Ry. Co. *v.* Missouri Pac. Ry. Co. 31 Kan. 661, 14 Am. & Eng. R. Cas. 439; Smith *v.* East End St. R. Co., 87 Tenn. 626, 38 Am. & Eng. R. Cas. 470; Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267, 1 Am. & Eng. R. Cas. 190; Briggs *v.* Lewiston, 79 Me. 363, 32 Am. & Eng. R. Cas. 167; Taggart *v.* Newport St. R. Co., 16 R. I. 668, 43 Am. & Eng. R. Cas. 208; Clement *v.* City of Cincinnati, 16 Wkly. Law Bul. 355; Cooley, Const. Lim. § 638; 2 Dill. Mun. Corp. § 722; Mills, Em. Dom. § 205. They are also in accord with reason and common sense. It is the view unanimously adopted by this court in Grand Rapids & I. R. Co. *v.* Heisel, 38 Mich. 62, (decided in 1878.) It is true that this question was not directly involved in that suit, but the extent of the use of streets was involved. The question appears to have been carefully examined by the court, and the authorities are cited. While it may be termed "*dictum*," still it comes to us as the deliberate opinion of the learned justices who then constituted the court, and as such is entitled to great weight. That decision clearly voiced the practical construction which had theretofore been placed upon these laws by the people, and upon the faith of which many such roads had been built in many cities of the state, and vast sums of money invested. We are cited by defendants' counsel to Taylor *v.* Bay City St. R. Co., 80 Mich. 77, 43 Am. & Eng. R. Cas. 335. The distinction between that case and the present one is too clear to require comment. The former was decided upon the express terms of the charter of Bay City. The charter of the city of Detroit contains no such provisions. The question here involved was not there even discussed.

5. It is also insisted that the poles interfere with access to the abutting property, and therefore constitute an invasion of private rights. It cannot be seriously claimed, under the evidence in this case, that these poles interfere with the present occupancy of the land. This is virtually conceded, but defendants insist that, in platting lots and selling them, it will be necessary to take them into consideration. This is a contingency which may never happen, and therefore no damage may ever result. Should it ever happen, the common council have ample power to require and compel these poles to be so placed as to create

Poles do not
interfere
with access.

no such interference. Failing in this, the defendants have an ample remedy in the courts. Such contingencies are too remote to form any basis for an injunction or for damages. It has frequently been held that telegraph and telephone poles are not necessarily erected to facilitate the use of the streets, and consequently that they create an additional servitude. But the authorities are by no means uniform. To the contrary are *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 258; *Pierce v. Drew*, 136 Mass. 75, 8 Am. & Eng. Corp. Cas. 83. These decisions are based upon the doctrine that the whole beneficial use of the land has been taken and appropriated to the public, and that one of the original uses of a highway was the transmission of intelligence. One of the first cases to make this distinction was *Taggart v. Newport St. R. Co.*, *supra*, (decided in January, 1890.) Referring to this case, Judge DILLON says: "The distinction * * * is so fine as to be almost impalpable, and it suggests serious doubts whether both conclusions are sound and reconcilable. The general subject awaits further development and settlement." 2 Mun. Corp. 893, note. The learned author does not state which he believes to be the correct principle. Since then the question as to whether the erection of poles for electric street railways constitutes an additional servitude has been several times before the courts, and thus far they have been held to be ancillary to a proper use of the street, and to create no such additional servitude. *Louisville Bag Manuf'g Co. v. Central Pass Ry. Co.*, (Ky.); *Halsey v. Rapid Transit St. R. Co.*, (N. J.), *ante* 76; *Pelton v. Railroad Co.*, ———; *Lockhart v. Craig St. R. Co.*, (Pa.), 21 Atl. Rep. 26. These poles used by the complainant are a necessary part of its system. When they do not interfere with the owner's access to and the use of his land, we see no reason why they should be held to constitute an additional servitude. Certainly they constitute no injury to his reversionary interest. To constitute an additional servitude, therefore, they must be an injury to the present use and enjoyment of his land. But they do not obstruct his light or his vision, as do the structures of an elevated railroad. Neither they nor the cars they assist in moving cause the noise, steam, smoke, and dirt which are produced by steam cars. They do not interfere with his going and coming at his pleasure when placed as they can and must be, so as to give him free access. Wherein, then, is he injured? If it be said that they are unsightly, and therefore offend his taste, it can well be replied that they are no more so than the lamp-post or the electric tower. It is as necessary that rapid transit be furnished to a crowded city as it is that light should be furnished to its streets. Public convenience and necessity must control in all such cases.

6. We have thus far discussed the questions involved upon the assumption that sufficient room was left to permit the free passage of teams and vehicles when the cars were upon the track. It is claimed by the defendants that this space is not sufficient for that purpose.

Sufficiency of
room in
street.

If this be so, it is evidently owing to the condition of the street, which is neither graveled nor paved, and to the nature of the soil, which in wet times is very muddy and difficult to travel. Such was its condition at the time this controversy arose, and it so continued during all the time to which the testimony was directed. The complainant's track is in the center of the street. Its grade was established by the city engineer, and presumably the grade of the street, when established, will be the same as the grade of the railway. The poles are about 21 feet 7 inches from the center of the road, are placed between the ditch and the sidewalk, and average 10 feet 4 inches from the fence line. The track is 4 feet 8 inches wide, and the cars are the same width as the ordinary horse cars. The distance from the rail to the pole is about 19 feet. This space is ample for the passage of teams and vehicles, if the street were properly graded. The evidence upon this branch of the case is entirely unsatisfactory, and insufficient to enable us to properly determine the question. It is apparent, both from the opinion of the learned circuit judge and the exhaustive briefs of counsel, that this was a matter of minor consideration in the court below, the main desire being to settle the other important questions involved. The roadbed and track were first constructed, and no steps were taken to enjoin the complainant when engaged in that work, and no objection appears to have then been made. No trouble arose until the complainant commenced to erect its poles, which were at first claimed to have been erected outside the street limits upon the defendants' lands, but which are clearly within such limits. Under this record we can only announce some general principles, leaving the defendants without prejudice to pursue such remedy as they may have when they can establish a violation of their legal rights: (1) The complainant cannot lawfully construct and operate its road in a street too narrow to admit the passage of its cars and other vehicles at the same time, nor so construct it as to interfere with the rights of the general public in the street. *Grand Rapids St. Ry. Co. v. West Side St. Ry. Co.*, 48 Mich. 433, 7 Am. & Eng. R. Cas. 95. (2) Nor in a street, though of sufficient width, if its condition be such that the operation of the railway will result in the practical exclusion of others from the use of the street. A railway so constructed and operated would be a public nuisance, and

the courts would abate it. (3) The complainant's roadbed and track must be built substantially with the level of the street, so as to permit vehicles to cross without difficulty. (4) The poles must be so placed as not to interfere with the right of ingress and egress to abutting property.

It is insisted that the court was in error in excluding testimony as to the dangers and actual perils witnessed by persons from the use of the new method of transit, for the reason that this testimony had a bearing upon the interference with the customary use of the street.

Limiting
number of
witnesses.

This question arose three times upon the hearing. On the two first occasions the testimony ruled out referred entirely to the tendency of these cars to frighten horses. The court made its third ruling at the close of the testimony of one Mrs. Reischer, who had testified to the decrease of travel upon the street, to the frightening of horses, and the decrease in rents. The court then announced that eight or ten witnesses had testified to the condition of the road, and no more testimony would be allowed on that point. Defendants' counsel announced that they had a large number of witnesses to the same effect, and asked permission to call two or three more. The court said that five or six witnesses to any particular fact was sufficient, and that it was clearly within its discretion to limit the number of witnesses; that as to the points already covered defendants would not be permitted to call more witnesses, but as to any new facts they might call more. The circuit judge was clearly right in this exercise of his discretion. Beyond this exercise of discretion the court, upon the hearing in equity cases, can exclude only such testimony as is scandalous and impertinent. The decree of the court below is affirmed, with the costs of both courts.

LONG, J., concurred with GRANT, J.

CHAMPLIN, C. J., (*concurring*).—I am not prepared to say that the construction of a street railroad track in a street is of itself no additional burden or servitude upon the street. I think it is, but to what extent depends upon all the facts and circumstances under which it is imposed. If the circumstances are such that in a narrow street, or in the work of construction, it becomes a nuisance to the property owners or the public, as pointed out by my Brother GRANT, I think the additional servitude would be quite apparent. If in any case it is such an invasion of private rights as to cause damage to the owner of the fee of the soil or abutting proprietors, I think they have a legal remedy to recover such damage in a suit at law; and so with regard to the setting of poles to aid the propulsion

Street rail-
way an addi-
tional bur-
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of cars by electricity. I do not think, ordinarily, it is such a taking of private property as requires condemnation and compensation before the poles can be set, but I think, if the owner suffers damage on account of the erection of poles, he should seek his remedy at law for such damage. I concur in the result reached by my Brother GRANT for the reasons—*First*, that the complainant was proceeding under color of legal authority to construct its railroad; and, *second*, I think the defendants have a complete legal remedy for all injuries complained of in their cross-bill.

MCGRATH, J. (*dissenting*).—I cannot concur either in the result arrived at by the majority or in the reasoning or conclusions of Mr. Justice GRANT. The case hinges upon the question as to whether or not the construction and operation of a street railway in a street, and, as incident thereto, the placing of poles therein upon which are to be stretched electric wires, is a new servitude; and I am clearly of opinion that a street railway, whether operated by animal power, electricity, or steam, is an additional burden; and it seems to me that the exemption of any street, whether narrow or not, is a practical concession to this view. If it is or can be an added servitude in any street, however narrow, it must be in any street, however wide, the only difference being one of degree. If the width of the street is to determine, just what width shall determine the question? If the right exists to grant a franchise in one street, and the exercise of that right concludes the abutting owner, why not in any street? Any fixed right of way in a street is a burden upon that street. Any use of a street, a like use of which is not common to all, is a new servitude. Any use of a street which narrows the street, or which interferes with the use of any part of the street, by the public, or confines the public to a use of but a part of the street, is an added burden. Any use of a street which increases the danger of a common use of that street is an additional servitude. Any use of a street which interferes with its use by the public is a use affecting the abutting owners. The value of property upon a street is materially affected by its width, by the portion thereof devoted to public travel, by the facilities afforded for ingress and egress, and by anything and everything that interferes with a common use of the street, or the abutting owner's access to it, or which obstructs his view, or interferes with the utility or beauty of his premises. He is entitled to every use which is not inconsistent with the public use, and to every use which is not inconsistent with such a use as is common to all. A street railway

Additional
burden—
Width of
street imma-
terial.

lays its track upon the surface and in the center of a street. It appropriates just so much of the street to its use, and to a use which is practically exclusive. It divides a wide street into two narrow streets. The portion of the street occupied by its tracks can only be used with increased danger. It cannot be crossed without danger, nor without the exercise of great care. Wheels and axles of vehicles are being constantly broken by attempting to drive on its way, or along or across its way, and the only answer which the street railway or the municipality makes to the injured party is, "Keep out of the track." It has been held that a line of omnibuses will not be allowed to run regularly upon street-car tracks to the injury of the business. *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525. Streets are laid out, not only with reference to roadway, but to sidewalks and margins for ornamentation. A street is laid out 50 feet wide, with a 25-foot roadway, and 12½ feet on each side for sidewalks and ornamentation. A street car track is laid through the center of the roadway, leaving practically but less than 10 feet each side of the track, insufficient for two teams to pass each other, and insufficient for one team to pass on that side of the street, if there should be a street car approaching, and a team hitched at the curb. Cars moving along these tracks have practically the right of way. They turn out for no one's convenience, and are practically moving obstructions in the street, discommoding other vehicles, and adding materially to the hazard of travel. The abutting owner cannot unload a load of freight or hitch his horse in front of his own door without increased risk. Because of the existence of these tracks roadways are being constantly widened at the expense of sidewalks and ornamental grounds and ornamentation. If the local legislature has the right to permit the laying of a single track, why not of two tracks, or of four tracks? Mr. Lewis, in his recent work on Eminent Domain, says: "Although the difference between the ordinary horse railway and the ordinary steam railway is obvious, yet the difference is only one of degree. The essential characteristic of both roads is that an exclusive franchise is granted in the soil of the street, and if the principle of the horse railroad cases is sound, then a street may be so filled with tracks as practically to exclude all other travel and traffic from the streets." Chapter 5, § 124. If a lot-owner has a frontage of 30 feet, he is entitled to 30 feet of unobstructed approach. If the council may grant the right to erect poles 100 feet apart, why not 50 or 25 or 12 feet apart? And then, why not the right to place cross-trees on the top of these poles, and ties upon the cross-trees, and stringers upon the ties, and all the incidents of an elevated

railway. If the increased needs of the municipality is to be the test, then the legal rights of the abutting owners must vary with place and varying population. An elevated railway in one of the populous streets of New York is as much a necessity there as is a surface railway on the street in question. A public highway is one over which all the people of the state have a common and equal right to travel. It is a way in which no one has the exclusive right to travel, nor the exclusive right to use it in a particular manner.

What is said by Dillon, regarding the use of a street by a steam railway company, is true in a sense of a street railway company: "A different use of the land from that for which it was intended cannot be justified on the ground that a railway is an improved highway."

Use of street
for steam
roads.

Railway companies are only public corporations, in a limited sense. The right of way, the roadbed, and the carriages propelled thereon are owned by private individuals, and not by the public. Fares are charged for travel thereon, for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where every one travels at pleasure in his own conveyance, without paying tolls or fares. The uses are totally different, and even inconsistent. The one is exclusive, in favor of private interest, and the other is open and free to all. 2 Dill. Mun. Corp. § 704. The defendants here are protesting against the occupancy of that street by the railway company, with its tracks, poles and wires, and it is notorious that, in a number of instances in the city of Detroit, the residents of streets have vigorously opposed construction of lines of street railways in front of their property. At the present time a petition is before the common council of that city for a franchise to construct an electric railway on Howard street, and the residents of that street have presented to the council the following reasons why the franchise should not be granted: "(1) That the street is too narrow of its present width to warrant the erection of such without placing in jeopardy the lives of every resident along said street. (2) That, in the event of a street railway along said street, the property from commencement to terminus will be depreciated in value. (3) That to undertake to widen said street, as has been suggested by some of the petitioners, would not only depreciate property along the street, but would destroy the shade trees upon both sides, which are not only a benefit, comfort, and luxury, but

Reasons why
electric road
should not be
constructed.

have taken years of care and attention to cultivate. (4) That Howard street is the only street which we have to drive up from the center to the western portion of the city with any degree of comfort, on the western side of city, south of Grand River avenue. (5) That, in the event of an ordinance being granted for a street railway along said street, the street would be absolutely destroyed for residence purposes, as has been shown by improvements along such street compared with the portion already burdened with a street railway track between Seventh street and Trumbull avenue. (6) That the erection of a street railway, as contemplated by petitioners, would be endangering the lives of every child along said street who feel more or less free at present to step outside its place of abode. (7) That the voluminous remonstrance against the same, presented to and now before your honorable body and committee, is a sufficient indication that the residents of said street have no desire for such. (8) That not a single individual has as yet petitioned for a line along said street, which is of itself a sufficient warrant that our present street railway accommodations are very satisfactory to all who live on said street. (9) That the recent decision of our supreme court pertaining to the erection of electric street railways through and along streets similarly situated as Howard street, is not justifiable, and cannot be done by the mere asking for and granting of the same. (10) That above all, it is not of a public necessity: Therefore be it resolved that these resolutions be adopted, and a copy be presented by a committee of three, to be appointed at this meeting, to the common council, and the committee on streets and ordinances."

Is it within the province of this court to say to these property owners, "You do not know what you do not want?" to say to them that, as a matter of law, the railway will not be a new servitude? to suggest that this occupancy and use will not depreciate their property,—will not bring a new danger to their doors, but will be an advantage to them? to declare as a matter of law, that this occupation of this street is a public necessity, whereas the public have not asked for it? It may be conceded that street car service is a public convenience; but the necessities of the public must be supplied at public expense. The legislature has no right to say that the property of the individual may be taken or injuriously affected for the public good without compensation. Public convenience is not to be subserved at the expense or disadvantage of the private citizen. The constitution provides not only that private property shall not be taken without compensa-

Public convenience should be at public expense.

tion, but it also provides that it shall not be taken at all, unless the necessity for the taking shall first be found by a jury or a commission appointed by the court. As was said by Justice CAMPBELL in *Powers' Appeal*, 29 Mich. 509: "No legislation can be maintained which does not plainly require this question to be left to a jury." The street itself is the major necessity, yet the land taken for streets in a majority of cases is just what must ultimately be given in order to the beneficial use of the remainder; yet, if the public demands it before the owner chooses to give it, the public must pay for it, and those who have dedicated their own land for street purposes are assessed to pay for the taking. Nor is it true that rapid transit or street railway transit is as necessary as light or sewerage or water, for these are actual necessities, while these methods of transit are simply conveniences. The common council has a right to provide that sewerage shall be directed to and through the public sewers, but it has no right to determine that transportation shall be confined to street railway cars. The lighting of the streets is necessary for the protection of the public and municipality as well. The public and the city are interested in having water for convenient use, whether used by abutting owners or not.

But it said that this is not a taking of property, within the meaning of the constitution. Property is the right to the beneficial use and enjoyment of a thing, and the right to dispose of that beneficial use and enjoyment. Any thing which impairs that use and enjoyment is a taking. The opening of a street may not divest the owner of the fee, yet it is a taking and appropriation. In *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 319, Justice CHRISTIANCY says: "It is a transparent fallacy to say that this is not a taking of his property, because the land itself is not taken, and he utterly excluded from it, and because the title, nominally, still remains in him, and he is merely deprived of its beneficial use, which is not the property, but simply an incident of property. Such a proposition, though in some instances something very like it has been sanctioned by the courts, cannot be rendered sound, nor even respectable, by the authority of great names. Of what does property practically consist, but of the incidents which the law has recognized as attached to the title or right of property? Is not the idea of property in or title to lands, apart from and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this ab-

What constitutes a taking of property.

straction, than of the incidents of property, which alone render it practically valuable to him? And among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use, and so far to control it as to exclude others from that use the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes in fact all that is beneficial in ownership, except the right to dispose of it, and this latter right or incident would be rendered barren and worthless, stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed,—of which we know nothing,—but of those properties of matter which can be rendered manifest to our senses, and made to contribute to our wants or our enjoyments." See *Eaton v. Boston C. & M. R. Co.*, 51 N. H. 504. The same cases which hold that a horse railway is a proper use of a street declare that a steam railway is not, and that the occupation of a street by a steam railway is a new servitude, yet the use by the steam railroad is within the same limits as that of the horse railroad. The burden may not be as great in the one case as in the other, but there is no difference in the principle.

In this state the fee is in the abutter, and he has, in addition, a greater interest in the easement in front of his own property than the public generally; but whether he has the fee, or but an easement, a burden upon either affects a property right. It is urged that this use of streets "must be supposed to have been contemplated." Is it possible that a use of a street which is not common to all streets, and which depends upon the desire of a street car company or the will of a common council, must be supposed to have been contemplated? Can this special use, depending upon the question of profit to its promoters, be deemed to be one of the ordinary purposes for which property for a street was taken? Can it be that the use of a street, as a mere outlet for a traffic, which in the absence of that use would be distributed over several streets, can be said to be a use contemplated at the opening of that street? Is it true that all the traffic of a given territory embracing a number of streets may be directed upon a given street, and a system of transportation adopted which interferes with the other and ordinary modes of travel upon that street, and the other streets relieved at the expense of that street, and yet this system of transportation is not a new burden? In a street opening proceeding, the measure of dam-

Use of street
for railway
not contemplated.

ages is the value of the property taken, and the physical injury to what is left; but in the condemnation of lands for railroad purposes another element of damages is considered, viz., the consequential injury to the remaining estate growing out of the mode and nature of the use. The very existence of these different rules clearly indicates that, in the street opening proceedings, no possible consequential injury was contemplated. The continuing consequential injury has always been treated as an element of the taking, and it has been held that a use of the same right of way by another steam railroad was a new servitude, although the damages must necessarily be consequential. *Southern Pac. R. Co. v. Reed*, 41 Cal. 256. The legislature cannot authorize either a direct or consequential injury to property without compensation to owners. It will not be claimed, even in the presence of this new use of streets, that it would be competent to permit a jury, in a street opening proceeding, to consider the probable or possible use of a street for street car purposes. The person whose land has been taken for the street has been compensated for the land, but he has also been assessed for the very benefit which this use deprives him of. Usually the benefits are assessed upon a limited territory, and not upon the public generally.

I am unable to reconcile the opinion of Mr. Justice GRANT with the case of *Taylor v. Bay City St. R. Co.*, 80 Mich. 77, 43 Am. & Eng. R. Cas. 335. That was a bill filed by abutting owners to enjoin the construction of a street railway. The court below dismissed the bill, but this court made a decree restraining the defendant from the use of the road in front of complainant's premises. That decision was put upon the ground that the charter of Bay City empowered the council of that city to authorize the running of street railways in the streets of said city upon the condition that the owners of lots adjoining and persons interested therein should receive compensation therefor, and the court restrained the company until it had complied with the statute "requiring condemnation proceedings." The company acquired the right to construct its road in 1864, but the amendment to the charter requiring compensation to be made was not enacted until 1869. If it be true that the street railway imposes only a servitude, then the statutory proceedings requiring compensation and condemnation proceedings is a barren provision, and the decree of this court requiring condemnation proceedings to be taken imposed a duty upon the railway company which could result only in annoyance to it. It was urged in that case, as strenuously as it is here, that the construction of a street railway in a street imposed

*Taylor v. Bay
City R. Co.*

no added servitude; hence the point was raised. The result is that abutting owners in Bay City are entitled to compensation because the statute has merely declared a remedy, while in Detroit they are not entitled to any remedy, because, as a matter of law, there is no injury. This is not a question of whether or not the public shall have street railways or rapid transit, but it is one as to whether the owners of property shall be divested of its beneficial use or enjoyment without compensation, because a private corporation is attracted by the prospective revenue there is in the enterprise, and, upon the plea that it will be a great public convenience, has obtained a franchise to appropriate a portion of the street to its use. It is upon this same plea that the public, through its legislatures, has parted with about all it had that was of value, except its interest in the public highways, and it remains to be seen whether they, too, will be surrendered to monopolistic control, to the detriment, not only of the public, but of abutting landowners as well. These owners have special interests in these ways, which courts, at least, are bound to respect. In this commercial age there is a growing tendency to avoid those constitutional methods which are designed for the protection of property rights of individuals which should be checked, else courts will in time be powerless to protect the rights thus acquired from unlawful attack or abuse. The constitution provides that private property shall not be taken until the necessity therefor shall have been first determined by a jury, and not then, until compensation shall be made therefor. If the necessity for this use of our public streets is so pressing, there should be no difficulty in its determination by the method pointed out by the constitution, rather than by the desire on the part of the corporation to use the street for the purposes of revenue; and whether the injury to abutting property is slight or great is a matter of fact to be determined by the jury, upon proper consideration of the situation and circumstances of each case.

MORSE, J.—In this case I concur most emphatically in all that has been said by Mr. Justice McGRATH in his dissenting opinion. I am satisfied that the system of railway in operation upon Mack street does fasten a new burden upon the land of the abutting owners of that street. It introduced a new and dangerous element of locomotion, certainly not known or even thought of, when the street was dedicated to public use, and for the purposes of public travel. I know that the current of authority, what little there is of adjudication upon the subject, is to the contrary; but in every single case the reasoning of the opinion, to me, rests upon a false and danger-

Electric street
railway is a
new burden
on street.

ous foundation. It is that the rights of the individual must give way to the needs of the public, in the use of new discoveries and inventions to facilitate travel and rapid transit in the great and growing cities of our land. But there is no public need that can, in right, be permitted to destroy or damage the property of the individual without compensation. The safety of this government, and of every community, rests, upon the protection of the law to the rights of the individual man. Railroads and other corporations ought not, under any plea of the public convenience or the public welfare, to be permitted to practically destroy the dwelling place of the humblest citizen, or to damage it, without compensation; and, when such an attempt is made, without any proposed compensation, and without the consent of the owner of the property, the strong arm of equity ought to interpose to save the rights of the individual thus threatened, without reference to the effect of such action upon the public, or its convenience. The system of propelling street cars by electricity, known as the "trolley system," burdens the street, in the first place, with a track wider than a wagon track, which is practically taken out of the street, away from the use of other travellers, and made the "right of way" of the street car company. Poles are planted in front of the property of abutting owners, and upon these are strung wires, charged with a dangerous, and not entirely certain, force, the full nature of which is known to but a few, if any, and the full control of which has, as yet, not been given to man. It has been held by the same authorities that consider a horse railroad not to be an additional servitude that a steam railway imposes a new burden. The only reasons given for the distinction are, as said, in one case, that the question whether any use of a street was a new servitude was one of degree, and depended on the manner in which the streets were used; that in the case of steam power to propel the cars there was noise and smoke, the trains were longer and heavier, and the speed was greater, than in the case of horse cars, and the use was practically inconsistent with other uses of the highway, *East End St. R. Co. v. Doyle*, 88 Tenn., 747; and that it has been found by actual experience that the use of cars propelled by steam upon a street practically destroys the street for any other means or purposes of travel. If the question to be considered, then, in determining whether or not the abutting landowners upon the street are entitled to compensation, is the degree that the proposed use may prevent the street being used for the ordinary, legitimate purposes of public travel, certainly such a road as this electric road upon Mack street

Property
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pensation.

does impose a new servitude, for which the defendants are entitled to compensation before the road is laid; for, under the circumstances shown, it is a nuisance, and practically destroys the street, and with the destruction of the street the property of defendants is taken. The evidence shows that between the car track and the ditch of the street there is only from six to eight feet in many places; that the track is raised from four to eight inches above the center of the street; that it is almost impossible to pass a car with any vehicle without being ditched; travel has decreased on the street; coal, wood, meat, milk, and other wagons will not go upon the street; the wires are strung so low that a load of hay cannot pass under them. People are denied access to their homes by teams and vehicles, and residence property has greatly depreciated since the road has gone into operation. The cars run with greater speed, and therefore with greater danger, make more noise, emit sparks and flashes of light, and are more dangerous, frightening horses, and even people. Under such circumstances, the use of these cars in this street, in its present condition, is a nuisance to the property owners on its line, and to all the public who travel upon it by ordinary methods. It is said that the city of Detroit can remedy most of these evils by grading and paving the street, and that the municipality can safely be trusted to do this. But the property owner or traveller on this street has no way of compelling the city to thus remedy the evils of which he may justly complain, and is not bound, in my opinion, to wait and suffer without compensation, and without any tangible hope of relief. It is bad enough, under the exercise of the power of eminent domain, to destroy or damage the home of the citizen, which he has planted upon the spot where he desires it to stand, when he is compensated for the pecuniary sacrifice; but it is a crime against him, and a violation not only of our constitution, but of the very essence of liberty, to damage or destroy it without compensation, at the will of municipal or other corporations. And, in my opinion, neither the city nor the legislature can permit a private or public corporation to practically destroy an existing street without the intervention of a jury or commissioners to assess the damages to the abutting owners by such destruction. The city of Detroit has no authority to allow a street railway company to obstruct the uses of a street. In such a case as the present, the street should have been graded and paved before the franchise was granted to the complainant.

This case, in brief, is this: Here is a landowner upon a resident lot abutting upon a street, in the soil of which he owns the fee, subject only to a public easement which he, by

dedication or otherwise, has granted for the ordinary and proper uses of a street or highway. When he built his dwelling house, abutting the street, and when he dedicated his land to the public use, such a thing as an electric railway was unknown, not only in operation, but even in the published thought of man. But the new discovery is made. Travel by the new method is more rapid, and therefore more convenient and useful to the public, than the old ways. And it requires money to operate such a road; there must be an aggregation of capital to organize and run it. A corporation is formed, and this corporation, asking only the leave of the public, represented by the common council of the city of Detroit, and against the protest of this resident landowner and his neighbors, proceeds to lay its tracks in the middle of this narrow street, raising such track above the level of the street to conform more easily in the future to a proposed grade, plant their poles at the edge of his sidewalk in front of his residence, string upon them wires from 13 to 18 feet above the ground, and commence running the cars. He must bring his wood, coal, hay, etc., upon some other street, as near to his residence as he can. He must bring his milk and meat home by hand. The value of his property is lessened, and his home becomes undesirable. He cannot sell, except at a sacrifice. In effect, his property is taken from him without compensation. When he goes into court he is informed that he cannot prevent this corporation from thus damaging his property, because the public demand, and must have, rapid transit; that his property cannot be protected, and his rights as an individual asserted, against this corporation because the public are benefited at his expense. This is to me a new doctrine of eminent domain. The public need and are benefited by steam railroads; the progress of civilization would be checked and the world at a standstill without them; but they have never been allowed to acquire private property except by purchase or condemnation. But here is an electric railway company permitted to take private property without consent or condemnation, and the landowner is powerless to prevent it; and it is doubtful, from the opinions of some of the learned judges who have upheld such proceedings, if he can even seek relief, after the road is laid and operating, in a court of law, for the actual damages he has suffered. In my opinion, no legislative grant, or municipal authority, under such grant, can thus deprive an individual of his interest in land, no matter how urgent the wants of the public. The need of the public cuts no figure when the question of compen-

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No authority
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sation to the landowner for the taking of his property is mooted. It can only be considered when the question of the right to take it at all is raised. But it is said that, although the fee is in the abutter, the whole beneficial use of the land for the purposes of a street is in the public, and that for those purposes it does not belong to the individual at all. Still it must be conceded that the abutter retains his easements of light and air and access to his premises, and also the right of the ordinary ways of travel upon the street to and from his land. These are property rights, and for the loss of these he is entitled to compensation. Nor can he be deprived of his rights because a court may think the damage to him is but trifling. It is by inches that ells are obtained. In the case before us this railway company may be taking but a pound of flesh, but in the case of the home owner it is the pound of flesh nearest his heart. The question whether or not a street railway constitutes a new burden was not before this court in the case of *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, and what was said in that case by Mr. Justice COOLEY ought to have no binding force, except, perhaps, from the fact that it has been acquiesced in for a long time by property owners in this state. I agree with Mr. Justice McGRATH that the argument in favor of the proposition there laid down by Mr. Justice COOLEY is unsound.

It seems strange that the same courts that hold that the planting of telegraph or telephone poles in the street impose a new servitude, and that they cannot be so planted without the consent of the owner, yet hold that the putting up of poles in the same place for an electric railway does not impose any new burden. The reason given is that telegraph and telephone poles are not used to facilitate the use of the streets for travel and transportation, "whereas the poles and wires of the railroad company are directly ancillary to the uses of the street as such, in that they communicate the power by which the cars are propelled." This distinction Judge DILLON has said "to be so fine as to be almost impalpable," and that "it suggests serious doubts whether both conclusions are sound and reconcilable." If it were not for the telegraph and telephone, the messages transmitted by them would have to go by mail or other carrier, and use the highways more or less therefor, and it needs but a little further extension of the principle laid down in the case of railway poles to include also telephone and telegraph poles. Indeed, the courts of two states have adopted such extension, and hold that the landowner is entitled to no compensation for the erection of the latter poles in the street. *Pierce v. Drew*, 136 Mass. 75,

Rule as to
telegraph and
telephone
poles.

8 Am. & Eng. Corp. Cas. 83; *Julia Bldg. Ass'n v. Bell Tel. Co.*, 88 Mo. 258. If this principle is to prevail because of the needs of and benefit to the public, our streets may be filled with street car tracks, preventing other methods of travel, and poles may be so thickly planted along our sidewalks as to even exclude light and air from our dwellings, and yet we shall have no remedy; for if one company may do anything of this kind another may. The only limit seems to be the legislative or municipal will; the individual is not a factor in the case; his rights have no weight with the law, although he is the one most vitally interested, if the old idea of the sacredness of his right to his home is not a myth or a humbug. The argument may be amplified in many ways, as it has been, to sustain the idea that an electric railway does not impose a new burden upon the land; but the fact remains, that no landowner wants such a railway upon his street in front of his home; that it is a means of travel not contemplated when most of our streets were dedicated; that the poles are unsightly, and a damage to the premises of the abutter; that the wires may and have been the means of injury and death; that the cars are more dangerous than horse cars, and more liable to frighten animals; that such a road depreciates the value of land as residence property upon the line of such road; and that it is a positive damage to the abutting landowner. Why, then, is not his property taken within the meaning of the constitution, and taken without compensation? Why should his property rights be disregarded? It can only be justified, as before said, upon the plea that the convenience of the public is so paramount to the rights of the individual that the property of the latter must be sacrificed without recompense for the benefit of the public. We have heard this argument before.

It has been more than once made in this court in favor of the great lumber corporations of this state.

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It has been contended that the lumbering interests of this state were so extensive, important, and valuable, and so identified with the interests of the public, that the poor farmer, with a small piece of land upon a navigable stream, must bear the servitude and burden of damage to his land by flooding of the streams and running of logs, without compensation, because the public would be benefited thereby. While this argument has been listened to, it has never as yet been accepted by this court as sound doctrine, and thus far the poor and weak have not been denied the equal justice of our laws. *Witheral v. Muskegon Booming Co.*, 68 Mich. 57, 58, 21 Am. & Eng. Corp. Cas. 229. The doctrine contended for is but a new phase of the old idea that "the king can do no

wrong.' It cannot prevail in a free government. The individual, in a republican form of government, is the one to be protected and guarded, and in his protection lies the security of liberty to the whole people. If the need of the public demands this kind of a railway for rapid transit, then the public can afford to pay for the privilege of destroying the property of the individual citizen. In no other case that I know of has the home of the individual been permitted by the law to be damaged without recompense, that the public might reap a benefit. If the need of the public is such that it must have this particular method of transit, that need will furnish corporations with the means to repay every private citizen for the loss and damage that his property must suffer to accommodate such public need. The plea that electric railways will not be built, unless the property of abutters upon the street is permitted to be taken or damaged without compensation, is too puerile to be considered as an argument in favor of the destruction of private rights.

Electric Street Railways—Rights of Abutting Lot Owners.—See *Halsey v. Rapid Transit St. R. Co.*, (N. J.) *ante* p. 76, note p. 89. *Taggart v. Newport St. R. Co.*, (R. I.) 43 Am. & Eng. R. Cas. 208.

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v.

LOUISVILLE & NASHVILLE R. CO.

(*Louisiana Supreme Court, April 27, 1891.*)

Exclusive Jurisdiction of Federal Courts.—A legal or equitable right under state laws may be prosecuted before state courts, and, when the parties reside in different states, before federal courts, subject to this qualification; that, when a right arises under a law of the United States, Congress may give the federal courts exclusive jurisdiction.

Same—Enforcement of Penalties.—If an Act of Congress gives a penalty to a party aggrieved, without specifying a remedy therefor, it may be enforced in a state court; but if a right is conferred by statute, or a specific remedy is provided, or a new power and means of execution are granted, the right can be enforced only in the mode prescribed by the act.

Same—Enforcement of Interstate Commerce Act—State Courts.—A party, who seeks damages, alleged to have been sustained in consequence of the violation by a common carrier of the interstate commerce law, as the act provides for redress by procedure either before the commission or by suit before the federal court, cannot bring suit before the state court, which is without jurisdiction to enforce the right, but is relegated exclusively to the commission or the federal court; otherwise, the party would have a third alternative or mode of redress, not contemplated by the act, by which he is restricted to one of two remedies.

APPEAL from the Civil District Court, parish of Orleans.
B. R. Foreman, for appellant.
Bayne, Denegre & Bayne, for appellee.

BERMUDEZ, C. J.—This is an appeal from a judgment sustaining a plea to the jurisdiction of a state court, relegating the plaintiff to that of a federal court. The action arises under the act of congress known as the “Interstate Commerce Act,” and is for the recovery of damages for averred unlawful discrimination by defendant, injurious to plaintiff, for the transportation of coal from another state, for several years. *Vide* 24 St. at Large, p. 382, sec. 9. The section relied on is to the effect “than any person or persons claiming to be damaged by any common carrier, subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure therein provided for they or he will adopt.” After referring to the ruling of the United States supreme court in the case of *Claffin*, 93 U. S. 136, 137, which is in point on the question, the district judge has well said “the general rule is that, where a particular remedy is provided for by law, such remedy must be sought to the exclusion of all others, in the cases contemplated by the statute; * * * otherwise, a person claiming injury, under the act of congress, instead of being compelled to elect which one of the two methods of procedure provided for by the act he will adopt, would be afforded a third alternative, not contemplated or provided for by the said act; and this in violation of its express terms, whereby he is limited to a choice between two remedies.” The authority referred to contains the following language: “A legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different states, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States court, or in the state courts competent to decide rights of the like character and class, subject to this qualification, that, where a right arises under a law of the United States, congress may, if it see fit, give to the federal courts exclusive jurisdiction. This jurisdiction is sometimes exclusive by express enactment, and sometimes

Case stated.

Exclusive
Jurisdiction
of federal
courts.

by implication. If an act of congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise, by some act of congress, by a proper action in a state court."

In the instant case, the right asserted by the plaintiff is claimed under an act of congress which specifies the remedy for its enforcement. This circumstance suffices to evidence that congress saw fit to give the federal courts exclusive jurisdiction. The motive which induced such legislation may have been, and no doubt is, to create one entire and complete system, and provide for the necessary uniform machinery to make it effective on an important and vital subject of national interest. See further, *Suth. St. Const. sec. 399*; *Dudley v. Mayhew*, 3 N. Y. 9; *the Moses Taylor*, 4 Wall. (U. S.), 429; *Martin v. Hunter*, 1 Wheat. (U. S.), 334; *Ex Parte McNiel*, 13 Wall. (U. S.), 236. The authorities referred to by the appellant do not sustain his position. Judgment affirmed.

Action under Interstate Commerce Act—Removal of Causes—Federal Question.—In *Lowry v. Chicago B. & Q. R. Co.* (C. C. D. Neb.) 46 Fed. Rep. 83, it was held that an action against an interstate common carrier by rail for damages caused by unjust discrimination in rates and charges against plaintiff as a shipper over its road, and in affording other shippers better facilities, and for unlawfully demanding and receiving extortionate rates from plaintiff, is an action arising under the interstate commerce act, though not in express terms based on that act, and, though an action would lie for the same cause at common law, is removable under Act Cong. March 3, 1887, when the petition for removal sets up defenses based on the interstate commerce act. The plaintiff may be content to rest his case on the common-law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense he has under the interstate commerce act. A case arises under a law of the United States, whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. It is enough that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant. On a motion to remand, the court will not anticipate the trial of the case by construing the act of congress and determining the rights of the parties thereunder. It cannot eliminate the federal question from a case by a premature decision of it, and then remand the suit upon the theory that it no longer involves a federal question. CALDWELL, J., said: "It is highly probable that in the progress of the case it will be found that, as to some of the plaintiff's causes of action, the statute is in some respects more favorable to the plaintiff than the common law. And the learned counsel for the plaintiff enter no disclaimer of their intention to avail themselves of these statutory advantages on the trial of the cause. But if the plaintiff's case was based, in terms, on the common law alone, that fact would not affect the question of removal. The plaintiff may be content to rest his case on the common-law liability of common carriers, but he cannot thereby deprive the defendant, as a carrier of interstate commerce, of any defense it has under the act of congress, which covers the ground of the common law, and much more. It is enough

that there is a federal question in the case, whether it is relied on by the plaintiff or the defendant. A case arises under a law of the United States whenever that law is the basis of the right or privilege, or claim or protection, or defense, of the party, in whole or in part, by whom it is set up. *Tennessee v. Davis*, 100 U. S. 257. The motion to remand is overruled.

CRUTCHER

v.

COMMONWEALTH OF KENTUCKY.

(141 *United States*, 47.)

Taxation of Foreign Express Companies—Regulation of Interstate Commerce.—An act of a state legislature (Act Ky. March 2, 1860, as amended by Act of 1866) regulating the agencies of foreign express companies, by requiring the agents of such companies to obtain a license from the state before they are permitted to carry on business there, and further requiring as a preliminary to such license, that such agents shall deposit with the auditor a statement of the company's assets and liabilities, and satisfy him that it has an actual capital of at least \$150,000, and further providing that if any agent of a foreign express company engages in business without such license he shall be subject to fine, is unconstitutional as a regulation of interstate commerce, in so far as it applies to a corporation of another state engaged in that business, although such corporation may also transport goods between points within the state. Reversing *Crutcher v. Commonwealth*, 40 Am. & Eng. R. Cas. 29.

FULLER, C. J., and GRAY, J., dissenting.

IN ERROR to the Court of Appeals of the State of Kentucky.

W. W. MacFarland, for plaintiff in error.

J. P. Helm, for the Commonwealth.

BRADLEY, J.—This case arose at Frankfort, Franklin county, Ky., upon an indictment found against Crutcher, the plaintiff in error, in the Franklin circuit court, for acting and doing business as agent for the United States Express Company, alleged to be an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier by express of goods, merchandise, money, and other things of value in and through the county and state aforesaid, without having any license so to do either for himself or the company. Crutcher, being arrested and brought before the court, tendered a special plea setting forth the facts with regard to his employment and the business of the company, and, among other things, that said company was a joint-stock company, incorporated and having its principal office in the city of New York in the state of New York, which plea was refused. He then pleaded

Case stated.

"not guilty," and the parties filed an agreed statement of facts; and by consent the matters of law and fact were submitted to the court, and the defendant was found guilty and sentenced to pay a fine of \$100 and the costs of prosecution. The agreed statement of facts was as follows: "It is agreed that the defendant is agent of the United States Express Co., a foreign corporation doing the business ordinarily done by express companies in this country, of carrying goods and freight for hire, not only from points in this state to other points in this state, but also of carrying same character of freight from points within this state to points without this state, in divers parts of the United States, and *vice versa*. And defendant, agent at Frankfort, Ky., never obtained any license to do such business, nor did said express company obtain any license from the state of Kentucky. The proportion of business done by the said company within and without this state for the month of November, 1888, is shown by a statement herewith filed, marked 'X,' and the same proportion of business within and without this state, approximately, is generally done by said company." The detailed statement referred to, marked "X," showed the total amount of business done by the company at the Frankfort office in November, 1888, to have been \$226.71, of which \$56.14, or not quite one-fourth of the whole, was business done entirely within the state; and the remainder, \$170.57, was done partly within and partly without the state; that is, the goods were brought into the state from places without the state, or were carried from the state to places without the state. Of course the latter, or largest, portion was comprised within the category of interstate commerce. The defendant upon these facts moved for a new trial, which was refused, and also for an arrest of judgment, which was denied, and a bill of exceptions was taken. The case was then appealed to the court of appeals of Kentucky, and the judgment was affirmed. The ground taken for reversing the judgment was that the statute of Kentucky under which the indictment was found was repugnant to the power given to congress by the constitution of the United States to regulate commerce among the several states.

The law in question was passed in 1860, and is as follows: "An act to regulate agencies of foreign express companies: Section 1. Be it enacted by the general assembly of the commonwealth of Kentucky, that it shall not be lawful, after the first day of May, 1860, for any agent of any express company, not incorporated by the laws of this commonwealth, to set up, establish, or carry on the business of transportation in this state, without first obtaining a license from the auditor of public accounts to carry on such business. Sec. 2. Before

the auditor shall issue such license to any agent of any company incorporated by any state of the United States, there shall be filed in his office a copy of the charter of such company, and a statement made, under oath of its president or secretary, showing its assets and liabilities, and distinctly showing the amount of its capital stock, and how the same has been paid, and of what the assets of the company consist, the amount of losses due and unpaid by said company, if any, and all other claims against said company or other indebtedness, due or not due; and such statement shall show that the company is possessed of an actual capital of at least \$150,000, either in cash or in safe investment, exclusive of stock notes. Upon the filing of the statement above provided, and furnishing the auditor with satisfactory evidence of such capital, it shall be his duty to issue license to such agent or agents as the company may direct to carry on the business of expressing or transportation in this state. Sec. 3. Before the auditor shall issue license to any agent of any express or transportation company incorporated by any foreign government, or any association or partnership acting under the laws of any foreign government, there shall be filed in his office a statement setting forth the act of incorporation or charter, or the articles of association, or by-laws under which they act, and setting forth the matters required by the preceding section of this act to be specified; and satisfactory evidence shall be furnished to the auditor that such company has on deposit in the United States, or has invested in the stock of some one or more of the United States, or in some safe dividend paying stocks in the United States, the sum of \$150,000, which statement shall be verified by the oath of the president of such company, its general agent in the United States, or the agent applying for such license; and upon the due filing of such statement and furnishing the auditor with satisfactory evidence of such deposit or investment, it shall be his duty to issue such license to the agent or agents applying for the same. Sec. 4. The statements required by the foregoing sections shall be renewed in each year thereafter, either in the months of January or July; and the auditor, on being satisfied that the capital or deposit, consisting of cash securities or investments as provided in this act, remain secure to the amount of \$150,000, shall renew such license." "Sec. 8. Any person who shall set up, establish, carry on, or transact any business for any transportation or express company not incorporated by the law of this state, without having obtained license as by this act required, or who shall in any way violate the provisions of this act, shall be fined for every such offense not less than one hundred nor more than five hundred dollars, at

the discretion of a jury, to be recovered as like fines in other cases. Sec. 9. For any license issued by the auditor under this act, and for each renewal thereof, he shall be allowed the sum of \$2.50, to be paid by the agent or company taking out such license.

An amendatory act passed in 1866 raised the license fee to \$5, and imposed a fee of \$5 for filing a copy of charter, and \$10 for filing an original or annual statement. The

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supreme court of Kentucky, in disposing of the case, gave the following opinion (*Crutcher v. Commonwealth (Ky.)*, 40 Am. & Eng. R. Cas. 29): "It seems to us that the case of *Woodward v. Com. (Ky.)*, 35 Am. & Eng. R. Cas. 498, in which the statute appears in full (decided by this court at its last term), determines the question now presented. Counsel for the appellant now claims that the statute of this state is invalid, as its effect is to regulate commerce among the several states. The agent of the express company was fined for not paying to the auditor a fee of five dollars, or, rather, for failing to take out a license required by the act regulating the agencies of foreign express companies, passed in March, 1860, and amended by the act of 1866. That the company of which the appellant is agent is a corporation created by the laws of New York, doing business in this state as a carrier of goods, wares, and merchandise, is conceded; and that it transports goods, etc., out of the state into other states, and all other species of property usually incident to such transportation, is admitted, both into the state and out of it. It appears that at least fifty per cent. of the business done by this agent consists in the carrying of goods from the place of his agency, Frankfort, to other states. That the carrying and transportation of goods from one state to another is a branch of interstate commerce is not controverted, but it is claimed that there is nothing in the legislation imposing on those who desire to act as the agents of this foreign corporation the burden of paying to the auditor the fee of five dollars for recording his agency, or, rather, for issuing him his license to act as such. The statute was enacted for the benefit of the citizens of the state, under which the auditor is required to have satisfactory evidence of the ability and solvency of the corporation to do that which it has undertaken to do by virtue of its act of incorporation. Those who intrust to its custody the transportation of their property are entitled to some security that its undertaking will be performed, and we find no law of congress or any constitutional provision that would deny to the state the right to impose such a burden upon those who undertake the discharge of such responsible duties. There is

no discrimination made between corporations doing a like business; and the state, although the appellant's company is a foreign corporation, has the same right to license the business and calling of this agent as it would that of the lawyer or merchant whose business is confined to the state alone." The court then referred to the cases of *Smith v. Alabama*, 124 U. S. 465, 33 Am. & Eng. R. Cas. 425, and to *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 38 Am. & Eng. R. Cas. 1, and concluded as follows: "We cannot perceive how any burden has been placed by the state upon interstate commerce by the provisions of the enactment in question, and must therefore affirm the judgment."

We regret that we are unable to concur with the learned court of appeals of Kentucky in its views on this subject. The law of Kentucky which is brought in question by the case requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts before he can carry on any business for said company in the state. This of course embraces interstate business as well as business confined wholly within the state. It is a prohibition against the carrying on of such business without a compliance with the state law. And not only is license required to be obtained by the agent, but a statement must be made and filed in the auditor's office showing that the company is possessed of an actual capital of \$150,000 either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the state legislature, it may be that the requirements and conditions of doing business within the state would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the state legislature. Congress would undoubtedly have the right to exact from associations of that kind any guaranties it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of congress it is to be presumed that congress has done or will do all that is necessary and proper in that regard. Besides, it is not to be presumed that the state of its origin has neglected to require from any such corporation proper guaranties as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact

Act constitutes a regulation of interstate commerce.

conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless congress should see fit to interpose some contrary regulation on the subject.

It has frequently been laid down by this court that the power of congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders, and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steam Ship Co. v. Tinker*, 94 U. S. 238. The prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several states; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the state legislatures. And the same thing is exactly as true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. *Telegraph Co. v. Texas*, 105 U. S. 460; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211, 13 Am. & Eng. Corp. Cas. 356; *Philadelphia & S. Steam Ship Co. v. Pennsylvania*, 122 U. S. 326, 342, 18 Am. & Eng. Corp. Cas. 1; *McCall v. California*, 136 U. S. 104, 110, 45 Am. & Eng. R. Cas. 1; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 118, 45 Am. & Eng. R. Cas. 9. As was said by Mr. Justice LAMAR, in the case last cited: "It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits." We

Power of Congress over interstate commerce is absolute.

have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter, how specious the pretext may be for imposing it. *Pickard v. Pull S. Car Co.*, 117 U. S. 34, 24 Am. & Eng. R. Cas. 1; *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489, 16 Am. & Eng. R. Cas. 1; *Leloup v. Port of Mobile*, 127 U. S. 640, 21 Am. & Eng. R. Cas. 26; *Asher v. Texas*, 128 U. S. 129, 23 Am. & Eng. R. Cas. 69; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104, 45 Am. & Eng. R. Cas. 1; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 45, 45 Am. & Eng. R. Cas. 9. As a summation of the whole matter it was aptly said by the present chief justice in *L. v. Michigan*, 135 U. S. 161, 166: "We have repeatedly decided that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of commerce which belongs solely to congress."

We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different states), does also some local business by carrying goods from one point to another within the state of Kentucky. This is probably quite as much for the accommodation of the people of that state as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company carrying on the business of interstate commerce, which is manifestly the principal object of its organization. The regulations are clearly a burden and a restriction upon interstate commerce. Whether intended as such or not, they operate as such. But taxes or license fees, in good faith imposed exclusively on express business carried on wholly within the state, would be open to no such objection. The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of congress. The insurance business, for example, can be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislature of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within

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the state. The cases to this effect are numerous. *Bank of Augusta v. Earle*, 13 Pet. (U. S.), 519; *Paul v. Virginia*, 8 Wall. (U. S.), 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.), 566; *Cooper Manufg. Co. v. Ferguson*, 113 U. S. 727, 8 Am. & Eng. Corp. Cas. 178; *Fire Ass'n of Philadelphia v. People*, 119 U. S. 110, 15 Am. & Eng. Corp. Cas. 421.

But the main argument in support of the decision of the court of appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well being of its citizens can be set up against the exclusive power of congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy v. Hardin*, 135 U. S. 100, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by congress, declaring that the traffic in such liquors as articles of merchandise between the states shall be free. There are, undoubtedly, many things which in their nature are so deleterious or injurious to the lives and health of the people as to lose all benefit of protection as articles or things of commerce, or to be able to claim it only in a modified way. Such things are properly subject to the police power of the state. Chief Justice MARSHALL, in *Brown v. Maryland*, 12 Wheat. (U. S.), 419, 443, instances gunpowder as clearly subject to the exercise of the police power in regard to its removal and the place of its storage; and he adds: "The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state." Chief Justice TANEY, in the License Cases, 5 How. 504, 576, took the same distinction when he said: "It has, indeed, been suggested that, if a state deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice, and pauperism into the state, it may constitutionally refuse to permit its importation notwithstanding the laws of congress; and that a state may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence, and pauperism from abroad. But it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can

Regulation
not a valid
exercise of
police power.

guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter, and traffic, like any other commodity in which a right of property exists." But while it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of congress, yet when that power, or some other exclusive power of the federal government, is not in question, the police power of the state extends to almost everything within its borders,—to the suppression of nuisances; to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse racing, or anything else that the legislature may deem opposed to the public welfare. *Bartemeyer v. Iowa*, 18 Wall. (U. S.), 129; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25; *Northwestern Fertilizing Co. v. Hyde Park*, *Id.* 659; *Stone v. Mississippi*, 101 U. S. 814; *Foster v. Kansas*, 112 U. S. 201; *Mugler v. Kansas*, 123 U. S. 623, 18 Am. & Eng. Corp. Cas. 614; *Powell v. Pennsylvania*, 127 U. S. 678, 23 Am. & Eng. Corp. Cas. 18; *Kidd v. Pearson*, 128 U. S. 1, 23 Am. & Eng. Corp. Cas. 221; *Kimmish v. Ball*, 129 U. S. 217. It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered,—even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid.

In view of the foregoing considerations, and of the well-considered distinctions that have been drawn between those things that are and those things that are not within the scope of commercial regulation and protection, it is not difficult to arrive at a satisfactory conclusion on the question now presented to us. The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by congress, or such as to exempt them from nullity when repugnant to the exclusive power given to congress in relation to that commerce. This is abundantly

shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate, any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void. And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the court of appeals must be reversed. The judgment is reversed accordingly, and the cause remanded for further proceedings not inconsistent with this opinion.

FULLER, C. J., and GRAY, J., dissent.

BROWN, J., not having been a member of the court when the case was argued, took no part in the decision.

License Taxes on Foreign Transportation Companies as a Regulation of Interstate Commerce.—See *McCall v. California* (U. S.), 45 Am. & Eng. R. Cas. 1, note 8; *Norfolk & Western R. Co. v. Pennsylvania* (U. S.), 45 *Id.* 9.

VERMONT & CANADA R. CO. *et al.*

v.

VERMONT CENTRAL R. CO. *et al.*

In re PETITION OF RUTLAND R. CO.

(*Vermont Supreme Court, November, 20, 1890.*)

Lease—Payment of Rent—Deferred Payments—Interest.—A lease of a railroad provided that the rent should be paid monthly on the last day of each month. The rent was not, in fact, paid until a portion of the month following the one on which it became due had elapsed. *Held*, that interest is chargeable on the deferred payments, notwithstanding a custom of railroad companies not to ascertain their balances for one month until the latter part of the next month.

Tax on Gross Earnings—Interference with Interstate Commerce.—A state statute, (Acts Vt. 1882, No. 1, §§ 1, 11, 12,) imposing a tax on the entire gross earnings of all railroads operated in the state, and providing that if a railroad be situated partly within, and partly without the state, the tax shall be proportionate to the mileage of trains run within the state, constitutes an interference with interstate commerce, and is unconstitutional and void.

Statute Requiring Lessee of Railroad to Pay Taxes—Deduction from Rent.—A statute requiring the lessee of a railroad to deduct the taxes levied on the road of the lessor company, from the rent payable under the lease, and to pay the same to the state, is not invalid as impairing the obligation of contracts.

Same—Tax upon Gross Earnings as Tax upon Property of Road—Payment by Lessee.—Taxes assessed upon the gross earnings of a railroad are taxes upon the property of such road within the provision of a statute requiring

the lessor of a railroad and not the lessee to pay such taxes. Especially is this so where the rent to be paid is a certain proportion of the gross earnings, and the statute directs the lessee to pay the tax and deduct it from the rent.

Payment of Taxes under Invalid Law—Rights of Lessor and Lessee after Act has been Held Unconstitutional.—The lessee of a railroad paid the taxes upon the gross receipts of the lessor company and deducted it from the rent as was provided by the state tax law, the decisions of the United States supreme court prior to the decision in the case of *Philadelphia & Southern S. S. Co. v. Pennsylvania*, 122 U. S. 326, 18 Am. & Eng. Corp. Cas. 1, upholding such a method of state taxation. That decision declared such a tax to be unconstitutional. *Held*, that the lessee of a railroad cannot be compelled to make good to the lessor the amount which it paid as taxes and deducted from the rent prior to such decision.

Same—Notice by Lessor to Lessee not to Pay Taxes.—The treasurer of the lessor company notified the lessee not to pay the taxes in question, since the lessor held that the statute was invalid. The statute required the lessee under heavy penalties to pay taxes and deduct them from the rent due. The notice of the treasurer made no offer to indemnify the lessee for resisting payment of the taxes. Under the decisions of the courts, as they stood at the time, the taxes were lawful. *Held*, that the lessor company was not entitled to recover from the lessee the amount of taxes paid by it, although the statute imposing them was afterwards adjudged to be invalid.

ROSS, J., dissenting.

APPEAL by defendants from a decree of the Franklin County Chancery Court, in favor of petitioner in an intervening petition to compel the payment of certain rent alleged to be due, and interest on deferred payments.

The chancellor dismissed the petition *pro forma*. The petitioner appeals.

The petitioner on December 30, 1870, by written contract, leased its railroad for the period of 20 years from January 1, 1871, to the trustees and managers of the Vermont Central and Vermont & Canada Railroads, who were acting as receivers, under the authority of the court of chancery. The agreement for the payment of rent in said contract of lease was as follows: "Art. 5. The parties of the second part agree to pay to the parties of the first part, for the consideration herein mentioned, three hundred and seventy-six thousand dollars (\$376,000) annually, payable in semi-annual installments of one hundred and eighty thousand dollars each, on the 20th days of January and July in each year hereafter, during the continuance of this contract, the first installment to be payable on the 20th day of July, 1871." As a part of this transaction the trustees and managers gave to the petitioner an order upon the Cheshire Railroad Company as follows:

"Vermont Central and Vermont & Canada Railroad, Office of President and Managers, St. Albans, Vt., Jan. 30th, 1871. E. Nurdock, Jr., Esq., President Cheshire Railroad Company—Dear Sir: A contract for operating and managing the Rutland

Railroad, the Vermont Valley Railroad, the Vermont & Massachusetts Railroad, (between Brattleboro and Grout's Corner,) the Whitehall & Plattsburgh Railroad, (Northern and Southern Divisions,) the Plattsburgh & Montreal Railroad, the Addison Railroad, and the steamboat 'Oakes Ames,' by the trustees and managers of the Vermont Central and Vermont & Canada Railroads, having been made and entered into by us with the Rutland Railroad Company, extending for a period of twenty (20) years from the first day of January, 1871. You will please to pay to the order of the Rutland Railroad Company the monthly balances which may be due from your company to us in settlement of traffic accounts, to an amount not exceeding ten thousand (10,000) dollars per month, during the year 1871, to Jan. 1st, 1872. From and after the first day of January, 1872, you will pay to the Rutland Railroad Company, or order, from such balances due to us, the sum of twenty thousand (20,000) dollars per month, such payments to be made by your company monthly, in the due course of settlement between the roads now in practice, subject, however, to be revoked by us, when we are ousted from possession of said railroad and property, under any of the terms and stipulations contained in the contract between us and the Rutland Railroad Company. You will please take the proper receipts from the Rutland Railroad Company for such payments, which will be your vouchers for such amounts in settlement with us. Very truly yours, J. GREGORY SMITH, President, Trustee, and Manager."

"The within order is accepted by vote of the directors of the Cheshire Railroad Company. Boston, Feb. 8th, 1871. E. MURDOCK, JR., President."

Referring to this order and another upon the Vermont Valley Railroad Company, not now material to be considered, the following clause was inserted in the aforesaid contract of lease: "Whereas, the party of the second part has given to the party of the first part an order upon the Connecticut River Railroad Company for such balance as may be due to the party of the second part monthly, from the business passing over the Vermont Valley road, not exceeding thirty thousand dollars monthly on an average, and has also given an order upon the Cheshire Railroad Company for such balance as may be due to the party of the second part to the amount of ten thousand dollars per month for the space of two years, and afterwards to the amount of twenty thousand dollars per month: Now, it is agreed by the parties hereto that all money received by the parties of the first part on the orders aforesaid shall be applied, free from any claim for interest, to the payment of the rents for the different roads herein specified

as the same become due." In reference to the meaning of the words "in due course of settlement between the roads now in practice," the master found: "The Rutland Railroad connects with the Cheshire Railroad at Bellows Falls, and, with other railroads, they form a line from points westward to Boston, over which business is done, for which collections are made, and balances at stated times are remitted between the companies. These balances, on account of the greater flow of business eastward, are always largely against the Cheshire Railroad Company on this part of the line, and in its favor on the part towards Boston. By the usual course of business a large part of the collections for this line of roads is made by that terminating in Boston. At that time monthly balances between that and the next road in the line were struck as soon as could conveniently be done after the expiration of each month, and the amount paid over, and then the balances between that and the next road were struck and the amount paid over, and so on in succession throughout the line. The balances between the Cheshire Railroad Company and the operators of the Rutland Railroad would not be struck until about the 25th of the succeeding month."

Defendant Central Vermont Railroad Company succeeded to the rights of the trustees, and took the property subject to all the liabilities imposed by said contract of lease. Disputes having arisen between the parties, payment was stopped upon the aforesaid Cheshire order until the execution of a further written agreement between the petitioner and the Central Vermont Company upon February 25, 1876, in modification of the contract of December 30, 1870. This agreement was known as the "contract of modification," and the Central Vermont Company continued to possess the property under it down to and at the time of the hearing before the master. Its provisions, so far as material, were as follows: "Whereas, a certain contract in writing, dated December 30th, 1870, was heretofore entered into by the Rutland Railroad Company, of the first part, and J. Gregory Smith, Joseph Clark, Worthington C. Smith, and Benjamin P. Cheney, trustees and managers of the Vermont Central and Vermont & Canada Railroads, of the second part, which is hereby referred to as part hereof; and whereas, said trustees and managers, for the purpose of securing the payment of the rent provided by the terms of said contract, to be paid the said Rutland Railroad Company, drew their two several orders in favor of said Rutland Railroad Company, to-wit, one upon the Connecticut River Railroad Company, and one upon the Cheshire Railroad Company, both dated January 30th, 1871, and both accepted by the respective railroad com-

panies upon which they were drawn, which orders and acceptances are referred to as part hereof; and whereas, certain controversies have arisen between said Rutland Railroad Company and the Central Vermont Railroad Company, successor in said trust, as aforesaid, touching the rents due and to become due to said Rutland Railroad Company, under said contract of December 30th, 1870, assignment of leases and orders drawn and accepted as aforesaid, as well as in respect to said Addison Railroad and various other matters: Now, for the purpose of effectually settling and terminating said controversies and all of them, and every and all matters of dispute, claim, or question of every name, nature, or description, that can or may now exist between said Rutland Railroad Company and said J. Gregory Smith and others, trustees and managers, as aforesaid, or said trust whereof they were trustees and managers, or the Central Vermont Railway Company, successors in said trust as receiver and manager, and in consideration of the settlement and adjustment of all such disputes and controversies, it is hereby mutually covenanted and agreed by and between said Rutland Railroad Company, of the first part, and said Central Vermont Railroad Company, receiver and manager, as aforesaid, and in its capacity of receiver and manager only, of the second part, as follows: Article 1. From after the first day of February, 1875, the party of the second part hereby agrees to pay to the party of the first part as rent for the use, management, and control of said Rutland and Addison Railroads, and the property connected therewith, or with either, the sum hereinafter mentioned, which shall be ascertained as follows: The gross earnings of the Vermont Central, Vermont & Canada, Rutland & Addison Railroads shall be semi-annually added together. Of the aggregate sum so arrived at there shall be set apart thirty-six and one-fourth per cent. thereof as the share of said Rutland and Addison Railroads of said gross earnings, out of which share the party of the second part may retain seventy-five per cent. as an agreed proportion for the payment of all expenses of operating said Rutland and Addison Railroads and maintaining said roads, their structure and equipment, in good order and condition, and keeping the same in repair, and of all other expenses incumbent upon the party of the second part in the operation of said railroads under and as provided in said contract of December 30th, 1870; and said party of the second part shall pay over to the party of the first part, as hereinafter provided, the balance, being twenty-five per cent. of said thirty-six and one-fourth per cent.: provided, however, and said party of the second part hereby agrees and does

hereby guaranty, that the amount ascertained as aforesaid, and payable to the party of the first part, shall amount to not less than the sum of two hundred and fifty thousand dollars for each and every year, commencing February 1st, 1875, during the continuance as modified hereby. And the party of the second part hereby covenants, promises, and agrees to and with the party of the first part to pay said annual sum of two hundred and fifty thousand dollars, and, in addition thereto, the sum of eight thousand dollars annually, as provided in said contract of December 30th, 1870, for the purpose of keeping up the organization of said Rutland Railroad Company, and of paying the incidental expenses thereof; said sums to be paid in equal monthly installments, and on the last day of each month during the time said party of the second part shall hold and possess said railroads under said contract, as modified thereby. And it is hereby further understood and agreed that, if in any year said twenty-five per cent. of said thirty-six and one-fourth per cent. gross earnings of said Vermont Central, Vermont & Canada, Rutland & Addison Railroads shall exceed said sum of two hundred and fifty thousand dollars, the amount of such excess shall be paid to the party of the first part by the party of the second part semi-annually, and within thirty days from and after the first days of January and July of each year. The party of the second part also agrees to keep accurate accounts of said gross earnings, and the books and vouchers pertaining to said accounts are to be open to the inspection and examination of the president and treasurer of said party of the first part, or either of them. The foregoing provisions of this article to be in lieu of and to stand in place of the provisions of said contract of December 30th, 1870, in relation to the rents payable for the use of said Rutland and Addison Railroads." The modification further provided that payments upon the Cheshire order should be forthwith resumed at the rate of \$20,000 per month. Previously to July, 1883, the rent had been paid as follows: Of the \$21,500 due on the last day of each month, \$1,500 had been paid directly by the Central Vermont Company, when due. The remaining \$20,000 had been paid by the Cheshire Company upon the order about the 25th of the month after it fell due. No claim was made to recover anything before July, 1883. Subsequently to that time the \$20,000 monthly which came by way of the Cheshire Company continued to be paid as before, about the 25th of the month after it fell due; and the first claim of the petitioner was for interest on this \$20,000 from the last day of the month until the time when it was actually paid, from month to month. It did not appear that the peti-

tioner had ever objected directly to the defendant as to this manner of procedure. It did appear that such objection had been made to the Cheshire Company, and that duplicate receipts were taken by that company from the petitioner, which specified the date of payment, and one of which was sent to the defendant.

The second claim of the petitioner was that since July, 1883, the monthly payment of \$1,500 had been withheld entirely by the defendant. This the defendant admitted, but claimed that it had properly retained these sums, and paid them to the state as taxes, in virtue of the provisions of No. 1, Acts 1882, and amendments thereto. The following are the sections relating to this controversy: "Section 1. Funds for the payment of state expenses shall be raised by direct state taxes upon the corporate franchise or business in this state of railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, and transportation companies, savings banks, savings institutions, and trust companies, as provided in this act, and shall be payable in money to the state treasurer for the use of the state." "Section 11. Every corporation, person, or persons owning or operating a railroad in this state, whether as owner, lessee, receiver, trustee, or otherwise, shall pay a tax to the state on the entire gross earnings of such railroad, if such railroad is situated wholly within the state. If such railroad is situated partly within and partly without the state the tax shall be upon such proportion of the entire gross earnings of such railroad as the mileage of trains run in this state bears to the mileage of all the trains run on the entire main line of the road. Sec. 12. The tax upon such earnings shall be rated according to the earnings per mile of road in this state, and is hereby assessed at the rate of two per cent. on the first two thousand dollars a mile, or total earnings of less than that sum; at the rate of three per cent. on the first thousand, or part thereof, above two thousand dollars a mile; at the rate of four per cent. on the first thousand, or part thereof, above three thousand dollars a mile; and, when the earnings exceed four thousand dollars a mile, at the rate of five per cent. on all earnings above that sum. Sec. 13. Such tax shall be payable one-half semi-annually in the months of February and August, and shall be based upon the gross earnings during the six months terminating with the last day of December or June next preceding. Sec. 14. When a railroad is operated in this state by a corporation, person, or persons, by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad or holder of such contract, as the case may be; and the said tax shall be charged against and deducted from any

payments due, or to become due, the lessor of such railroad, or person, persons, or corporation granting such contract, as the case may be, on account of such lease or contract; unless in the provisions of such lease or contract it is stipulated otherwise." The master found that, in accordance with the foregoing act, the defendant had actually paid to the state as taxes the greater part of the sums so retained; further, that the gross earnings upon which these taxes were assessed largely "accrued from transportation of persons and property between other states and countries through this state, and between this state and other states and countries." The first payment of taxes was due in August, 1883, for the half year ending June 30th. It was paid about August 30th by the defendant, who notified the petitioner of the payment September 12th, inquiring at the same time how it should be settled. Thereupon the treasurer of the petitioner addressed to the defendant the following letter, dated September 19, 1883: "Dear Sir: Yours of Sept. 12 was received in due season, and contents carefully considered, and, after consultation with the attorneys of this corporation, I will say, in reply, the Rutland R. R. Co. claims that the tax referred to in your favor of the 12th inst. to be invalid against said company, and that this company is entitled to its rent in full as stipulated in its lease. Accordingly we demand payment of the same in full, without deduction on account of said tax, we leaving the matter to stand as before, in order to preserve our legal rights in the premises unprejudiced. Of course the matter of settlement and litigation of the question involved will go on with amicable spirit, and without misunderstanding. Yours, very respectfully, JOHN A. MEAD, Treasurer."

C. A. Prouty and Stewart & Wilds, for petitioner.

B. F. Fifield, E. J. Phelps, Albert Cross, and L. H. Thompson, for defendants.

POWERS, J.—Two questions have been argued before us: (1) Whether the monthly payments of rent due under the modified lease draw interest from the last day of the month on which it is claimed they mature, and (2) whether the petitionee is liable to the petitioner for the unpaid rents withheld to meet the taxes assessed upon the gross earnings of the Rutland road.

Questions presented.

By the terms of the original lease of the Rutland and Addison Railroads, made in 1870, the rent was payable semi-annually on the 20th days of January and July in each year. As part of the arrangement between the parties, and as security for the payment of the stipulated rent, the trustees and managers of the Central and

Further statement.

Canada roads gave to the Rutland an order upon the Cheshire road to pay to the Rutland, for the year 1871, a sum not exceeding \$10,000 per month from the balances due in traffic accounts; and after that year the sum of \$20,000 per month from the same source; "such payments to be made monthly, in the due course of settlements between the roads now in practice." The due course of settlement then in practice between the Cheshire and Central and Canada roads was for the several roads constituting the line terminating in Boston to adjust and pay the monthly balances, as soon as practicable, at the end of each month's business. Under this practice the balance due from the Cheshire to the Canada and Central would not be struck until about the 25th of the succeeding month. A clause in the original lease, after reciting the giving of the order aforesaid upon the Cheshire, provided that all moneys received by the Rutland upon such order should be applied to the payment of rent due under the lease, free from any claim for interest. As the contract then stood between the parties to the lease, it is clear that the clause providing that the sums paid monthly by the Cheshire, which the Rutland was to apply to the payment of its rent, free from all claim for interest, was inserted for the benefit of the Rutland. The rent was only payable semi-annually; the balances due under the Cheshire order were to be received by the Rutland monthly; the balances were to be applied in payment of rent. Thus, in fact, a considerable part of each half-year's rent would be received by the Rutland before such half-year's rent was due. Nobody could thus be chargeable with interest except the Rutland, by reason of the advance payment of its rent. On February 25, 1876, the original lease in force between the parties was in certain respects modified. The rent, which, under the original contract, was payable semi-annually, was made payable in equal monthly installments, and on the last day of each month. The basis for ascertaining the amount of rent payable was fixed, and the Cheshire order was by the modified contract to "stand as a continuing security for the payment of the rents herein stipulated to be paid." A clause in the modified contract also provided, in substance, that the Cheshire order should be paid practically as it had been under the original lease, and in fact the balances under it have been paid to the Rutland about the 25th of the month following the month in which such balances were earned. The petitioner now seeks to recover interest upon these deferred payments.

As already seen, the rent under the modified contract was payable monthly and on the last day of the month. A day certain was fixed for its payment. If not paid when due, it

is clear that interest would be chargeable upon it until it was paid. The Cheshire order was not accepted as a payment of rent, but as collateral security for its payment. The lessees owed the month's rent on the last day of each successive month without regard to the fact that anything was, or was to be, realized from the "continuing security" afforded by the Cheshire order. Under the original contract, the Rutland, by way of the Cheshire order, received its rent before it was due, and had the right to apply the amount so received without accounting for interest. Under the modified contract the rent has not been paid when due, and no clause in the modified contract says anything respecting interest upon payments made under said order, or otherwise. The clause in the original contract providing for the application of the proceeds of the Cheshire order to the payment of rent, free from any claim for interest, related to the advance payments which the Rutland then received. Under the modified contract, the clause which was inserted in the original contract for the purpose of protecting the Rutland from a liability cannot now be used to protect the other contracting party from a like liability; but, the modified contract making no reference to it at all, the clause has ceased to be operative for any purpose, and the basis upon which the rent is payable has been so changed as to make it inapplicable. The petitioner is entitled, therefore, to interest upon the deferred payments of monthly rent from the last day of each month when such payments respectively matured.

Interest on deferred payments of rent.

The defendants have retained a considerable sum from the rents payable to the Rutland, and paid the same to the state as taxes assessed under the acts of 1882 and 1884 upon the gross earnings of the Rutland road while in defendants' possession. The Rutland Company contends that the state law referred to, so far as it seeks to impose a tax upon the earnings derived from interstate commerce, (and a very large proportion of the earnings referred to were of this character,) is unconstitutional, and that the defendants were not justified in paying the taxes assessed upon them. That all transportation of freights and persons from points without to points within the state, or from points within to points without the state, as well as from points without through the state to points without, is commerce between the states, is abundantly settled both upon principle and upon authority. *Fargo v. Stevens*, 121 U. S. 230, 31 Am. & Eng. R. Cas. 452. All agree that interstate commerce is not the subject of state regulation, and the cases are uniform in holding that a tax upon

Tax on earnings derived from interstate commerce invalid.

such commerce is a regulation, within the inhibition of the federal constitution. *Fargo v. Stevens*, *supra*; *Philadelphia & S. Steam-Ship Co. v. Pennsylvania*, 122 U. S. 326, 18 Am. & Eng. Corp. Cas. 1, and cases there cited. All agree that the decisions of the highest federal court are binding upon this court when federal questions are involved, and that the only inquiry open to us, touching the validity of the tax now in question, so far as it lays hand upon the earnings derived from interstate commerce, is, what is the declared doctrine of the United States supreme court upon the subject? That the course of decision in that court upon this and analogous subjects has not been entirely uniform the diligence of counsel in this case has fully demonstrated: but the case last above cited is the latest decision of that court which has come to our attention, and so, for the purposes of this case, that decision must be accepted as the supreme law of the land. Fortunately the facts of that case were quite like those of the case at bar. There, as here, the state of Pennsylvania had levied upon the gross receipts of a corporation chartered by itself, and there, as here, such receipts were the product of interstate commerce. The court reviews the authorities, and, through Mr. Justice BRADLEY, held that the Pennsylvania law was unconstitutional. It would serve no useful end to trace the line of reasoning adopted in this case, nor to attempt a reconciliation of this decision with earlier ones of the same court, claimed to be variant from it. We, as judges of a state court, are bound by the very language of the federal constitution to accept the construction of any part of that constitution made by the supreme court: and in this case the reasoning of that court seems to us to be entirely unanswerable. We hold, therefore, that our corporation tax law, so far as it seeks to tax the earnings derived from interstate commerce, is unconstitutional, as it interferes with the commerce, the regulation of which is within the exclusive control of congress.

It is further contended that our law also violates another clause of the federal constitution, in that it impairs the obligation of the contract subsisting between the parties respecting the payment of rent, by requiring the lessee to pay the tax and deduct the same from the stipulated rent, and the case of *Murray v. Charleston*, 96 U. S. 432, is relied upon as supporting this contention. It is quite true that some of the language of Justice STRONG in the opinion in that case gives some color to the contention now made; but this language is to be construed with reference to the case then in hand. In that case the city of Charleston was owing a non-resident

Statute as to
payment of
taxes by les-
see is consti-
tutional.

creditor a debt bearing interest. Under a law of the state, the city passed an ordinance directing its officers to deduct from the interest payable upon the debt a certain sum as a tax upon the debt. The question was, could the city do this? And the court held that it could not, as it thereby would impair the obligation of a contract. It is to be noticed that the city had no right to tax the creditor at all. He was a non-resident, and the debt had its *situs* in the place of his domicile, and not in Charleston. If the creditor had residence in Charleston, and thus had been within the jurisdiction for purposes of taxation, there could be no doubt that the city could have properly taxed him upon indebtedness. The only question which could then arise would be as to the propriety of the method adopted for the collection of the tax. But in the case at bar both the Rutland and the Central and the rent due from the Central to the Rutland are proper subjects-matter for taxation, under our law. The case, then, is clearly distinguishable in its facts from *Murray v. Charleston*, and we think the method prescribed for the collection of the tax is no impairment of the contract to pay the rent due under the lease. In *Osborn v. Nicholson*, 13 Wall. (U. S.), 654, the court says: "All contracts are inherently subject to the paramount power of the sovereign, and the exercise of that power is never understood to involve their violation, and it is not within that provision of the national constitution, which forbids a state to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself." To the same effect, see *West River Bridge Co. v. Dix*, 6 How. (U. S.), 532. When, therefore, the parties made the lease whereby the Central undertook to pay a stipulated rent to the Rutland, both made their contract with notice of, and in subordination to, the right of the state to exact from the fruits of their contract by way of taxation such sum as it might properly collect for public purposes. Having, then, the right to levy the tax, the method to be adopted for its collection is purely a question of legislative discretion, with which the court has no power to interfere so long as no legal or constitutional rights are disturbed. The whole power of taxation, under our system of government, is lodged in the legislature, subject only to constitutional limitations. What subjects-matter shall be selected, what amounts shall be assessed, and the methods of assessment and collection of taxes, are solely questions for the legislature to determine. If in any respect the constitutional rights of the taxpayer are involved, he has his remedy, but beyond this the legislative power cannot be questioned. In this case the law itself made the assessment.

This has been held to be no impairment of the taxpayer's rights. *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227. We have a statute by which a collector may collect a tax by the trustee process. In the case of non-residents taxes assessed upon national bank shares of stock are paid by the cashier, and deducted from the dividends declared upon such shares. The same method is adopted in the case of other corporations. In the case of *St. Albans v. National Car Co.*, 57 Vt. 68, 11 Am. & Eng. Corp. Cas. 648, our statute (R. L. § 284) providing that taxes assessed upon the stock of non-resident stockholders in a corporation shall be paid by the corporation, and the corporation shall have a lien upon the stock and its dividends as security, and may deduct the taxes paid from dividends declared, is held constitutional. Taxes must necessarily be collected by summary methods, and we see no reason why the legislature could not direct the Central to retain and pay over to the state from funds in its hands belonging to the Rutland all taxes which might be assessed against the Rutland. The contract to pay rent is not impaired because it was made subject to just that kind of impairment, and so the Rutland gets all under it that it can legally claim. We hold, therefore, that section 14 of our corporation tax law is not unconstitutional in respect to the method prescribed for the collection of taxes assessed upon the earnings of railroads operated by lessees. But it by no means follows, because the defendant has paid to the state taxes under a law afterwards held to be void, by withholding the amount thereof from the rent, that the Rutland can now claim the balance of its rent unpaid for this reason.

Down to May 27, 1887, the date on which the decision of the court in 122 U. S., 18 Am. & Eng. Corp. Cas., above cited, was promulgated, the doctrine of the cases decided by the supreme court upheld the constitutionality of the taxation in question. State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284; *Minot v. Philadelphia W. & B. R. Co.*, 18 Wall. 206; and the numerous cases cited in the defendants' brief. Accordingly all payments theretofore made were, so far as the validity of the tax was involved, payments made in obedience to law. It is an elementary principle that a contract valid under an existing law, and payments made upon it, will not be invalidated by subsequent legislation or subsequent judicial interpretation of the law. The decision of a court of competent jurisdiction upholding the validity of an existing law validates everything done under it, so long as such adjudication remains unchanged. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175; *Havermeyer v. Iowa City*, 3 Wall. (U. S.) 294; *Cass Co. v. Johnston*,

Effect of subsequent judicial interpretation.

95 U. S. 360; *Douglas v. Pike Co.*, 101 U. S. 679; *Ohio L. Ins. & Trust Co. v. Debolt*, 16 How. (U. S.) 432; *Township of Pine Grove v. Talcott*, 19 Wall. (U. S.) 677. As said in *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175: "The sound and true rule is that, if the contract when made was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of the legislature, or decision of its courts, altering the construction of the law. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law." Affirmed in *Havermeyer v. Iowa City*, 3 Wall. (U. S.) 294. And in *Douglas v. Pike Co.*, 101 U. S. 677: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment." And in *Lyon v. Richmond*, 2 Johns. Ch. (N. Y.) 51: "Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind; and to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of a like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society there is no such pernicious precedent to be found. This case, therefore, is to be decided according to the existing state of things when the settlement in question took place." Suppose this court should hold to-day that our tax law is valid, and a year hence should reverse its decision, and hold it invalid; would it be seriously claimed that rights gained and liabilities assumed meantime would be upset? No such rule of law could be tolerated for a moment. The supreme court of the United States is the supreme arbiter when a federal question is involved. Down to 1887 that court had ruled the federal question now under consideration in a way that upheld the legislation in question. Its decisions then promulgated were the supreme law of the land, absolutely binding upon both parties to this cause; hence all payment of taxes made under our

law, which down to that time must be treated as valid for present purposes, were made in strict conformity to law. The subsequent change in the decisions of the United States supreme court is only operative prospectively, and all acts done in obedience to the former decisions are valid and cannot be disturbed.

Again, the taxes in question were taxes which, as between these parties it was the duty of the Rutland Company to pay.

Nature of tax Under the original, as well as the modified, lease
—Party no provision for the payment of taxes was made.
bound to pay. The lease being silent, the duty to pay under the common law, rested upon the lessor. Tayl. Landl.

& Ten. §§ 341, 395. Moreover, the precise question arose between these parties and was decided by this court at the January term, 1878, in Rutland County. In that case certain taxes had been assessed upon the Rutland road under the provisions of the acts of 1874 and 1876, taxing the real estate of railroad corporations. The defendants, then, as now, operating the road under the lease aforesaid, declined to pay these taxes; whereupon the Rutland Company brought its petition to the court of chancery, praying, among other things, that the lease and the modification of the same in force between the parties "may be construed, and the rights and liabilities of the parties thereunder may be determined touching their duty and obligation, or the duty and obligation of either to pay said taxes so assessed as aforesaid, as well as all future taxes that may be assessed on the real estate of your orator and said trustees and managers." The case was fully argued and fell to Chief Justice PIERPOINT, who prepared no opinion, but the mandate declared that "the defendant is not liable to pay taxes assessed upon the property of the Rutland Railroad Company." It is clear that, if the taxes in question upon the gross earnings of the Rutland road are a tax "upon the property of the Rutland Railroad Company," the case just cited is applicable to the case in hand. The tax is not a franchise tax, as it is levied indiscriminately upon the earnings of all railroads operated in the state, irrespective of the source of their chartered power. *Philadelphia & S. Steam-Ship Co. v. Pennsylvania*, *supra*. It is, in terms, a tax upon the earnings of railroads rated by the mile. It is not a tax upon the company which operates a railroad, nor upon the income received by such company, but upon the fares and freight which come from the operation of the particular road. The object of the legislature was to make each railroad in the state, as a railroad, contribute to the public treasury its proper share of the burdens of taxation. Under the act of 1874 the plan of treating railroads

as real estate was adopted as the basis of a scheme of taxation. This act not proving acceptable, in 1882 the plan was adopted of graduating the taxation upon the basis of earnings. In both cases the tangible thing upon which the state laid its hand was the railroad itself, and, unless we substitute the shadow for the substance, the thing taxed under the act of 1882 was "the property of the Rutland R. R. Co." That the tax in question was a tax which the Rutland Railroad Company should pay is clearly seen by reference to the act itself. Section 11 provides that every corporation, person, or persons owning or operating a railroad in this state, whether as owner, lessee, receiver, trustee, or otherwise, should pay a tax to the state on the entire gross earnings of such railroad, etc. The thing taxed was, then, the gross earnings of somebody's railroad. Who that somebody is can be learned from the fourteenth section: "When a railroad is operated in this state by a corporation, person, or persons, by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad or holder of such contract, as the case may be; and the said tax shall be charged against and deducted from any payments due, or to become due, the lessor of such railroad * * * on account of such lease or contract." Now, then, when the act directs the Central to pay the tax, and charge it against and deduct it from the rent due the Rutland, it makes the Rutland in fact the taxpayer, instead of the Central. The Central is the mere collector of the tax; the Rutland, the lessor; in the lease of its road, it is the party actually assessed; and, if the Rutland is the taxpayer aimed at by the law, it must be the property of the Rutland that is assessed. The law reaches the property of the taxpayer it selects as the party liable for the tax. It is not exactly sound to say that the Rutland has no gross earnings, because it has rented its road, and, under the contract, the earnings go to the defendants. Under the modified lease, the rent is made up from gross earnings. The defendants agree to pay a rent ascertained in a specified manner from the gross earnings of the Rutland road, upon a basis fixed in the contract. The defendants stipulate that the gross earnings shall equal at least the sum of \$250,000. It is true, a hotchpot of the earnings of the Rutland, Addison, Canada, and Central roads is made; still, by contract between the parties, 36 $\frac{1}{4}$ per cent of the aggregate earnings of all said roads is set apart as an arbitrary, fixed, liquated share of the whole earnings properly belonging to the Rutland and Addison roads. These roads, then, have earnings within the purview of the tax law, as much so as the Canada and Central, and it was the earnings, *eo nomine*, that the legislature desig-

nated as the subject to be taxed, irrespective of the question whether A. or B. was entitled to pocket such earnings. It being therefore the duty of the Rutland to pay the taxes in question, the defendants have been compelled by law to discharge an obligation belonging to another. In such case the law implies the request, and the defendants would have an action to recover back such payments; but a court of equity will avoid a circuity of action wherever it is practicable to do so.

The notice given by Dr. Mead, the treasurer of the Rutland road, by letter dated September 19, 1883, does not help the petitioner. The Rutland Company then knew that the defendants were paying these taxes, and deducting the amount from the current rent. The

Notice to lessee not to pay tax.

Rutland Company simply says that it claims the tax to be invalid. No suggestion or hint is made as to the ground of the invalidity; much less that the law was unconstitutional. Indeed, at that date, so far as any light had been thrown upon that question by the supreme court, the law stood as a valid law. If the defendants declined to pay the taxes, they subjected themselves to heavy penalties. The Rutland Company made no offer to indemnify the defendants, and, as prudent men, the defendants could not do otherwise than pay. They were under no duty to incur the expense and assume the perils of delay and of litigation to test the validity of a law passed by the legislature, and which they had the right to assume was constitutional. The petitioner comes into a court of equity to obtain the relief prayed for. It must do equity. It can only do equity by leaving the defendants where for the greater part of the time the law has left them, and where for the whole time they have been doing what, as between the parties, the petitioner should have done, and what by its own laches the petitioner has suffered them to do, professedly in its behalf. Accordingly, the defendants are not liable to pay as rent the amount paid by them as taxes upon the earnings of the Rutland road. The decree is reversed, and the cause remanded, with mandate.

ROSS, J., (*dissenting*).—I concur in the views of the majority of the court on the question of interest, but disagree with reference to the construction to be placed upon sections 1, 11–14 of No. 1 of the acts of 1882. These contain the entire provisions of the act relative to taxing railroads. In determining upon the proper construction to be given to these sections, all their provisions must be considered. If section 11 stood alone, I should say that the tax is imposed upon the entire gross earnings received

Construction of statute.

by a corporation or person from the operation of a railroad within this state. Its language seems to demand such construction. The first part of the opinion of the majority of the court assumes that this is the construction to be placed upon the act, and therefore holds the tax, so far as derived from interstate commerce, void. On this construction they justly hold that that part of the tax assessed upon the earnings derived from interstate commerce is unconstitutional and void, in accordance with the decision of the United States supreme court in *Philadelphia & S. Steam-Ship Co. v. Pennsylvania*, 122 U. S. 326, 18 Am. & Eng. Corp. Cas. 1. If a tax upon the entire gross earnings, it must rest upon the party to whom such earnings belong. In that case, under the lease by the orator to the defendant, I think the tax would clearly fall upon the defendant; and the payment of the tax by the defendant would only pay its debt to the state, and would pay no part of the rent due from it to the orator. Under the lease, I think the defendant alone is entitled to, and owns the entire gross earnings derived by it from operating the railroad of the orator. I do not think the reference in the lease to the gross earnings for the purpose of fixing the amount of the rent makes any part of the gross earnings, as such, the property of the orator. Such earnings were not made the property of the orator, nor was the defendant under obligation to turn such earnings over to the orator in payment of the rent due it. The rent was to be paid in part by the order on the Cheshire Railroad Company. What was not thus paid the defendant could pay out of any funds which it could control. The orator, I think, had no gross earnings. Its income derived from the rent fixed by the lease was not gross earnings within the contemplation of the statute. While it owned the roadbed and rolling stock, it did not operate them. Hence, if this section were the whole of the law applicable to the taxation of this class of property, I should hold that the tax, whether valid or invalid, rested upon the defendant's property, and such payment gave the defendant no relief from paying the full amount of the rent stipulated in the lease. But this section does not contain the whole law relating to this subject. Sections 12 and 13 of the act need not be considered. They relate to the mode of ascertaining the amount of the tax per mile of the road operated in this state, and to the times when the tax is required to be paid.

In ascertaining the intention of the legislature, section 14 of the act must be considered. That section provides that, when a railroad is operated under a lease or contract, by some party other than its owner, the tax shall be paid by such other party, but for the owner of the railroad. It proceeds upon

the basis that the tax in all cases is upon the property of the railroad, and to be paid by its owner. When, therefore, the railroad and rolling stock of a company are operated by a lessee or contractee, for his own benefit, and when the gross earnings derived from operating the property belong, by the terms of the lease or contract, to the operator, the tax rests, not upon the gross earnings *in specie*, but upon the railroad, rolling stock, and right to operate them valued upon the basis of the gross earnings per mile derived therefrom. By both sections 11 and 14 the tax is made to rest upon property. I do not think that the act should be so construed as to make the tax rest upon the property of the lessor or contractor, the railroad rolling stock, and right to operate them, when operated under a lease or contract, and upon the gross earnings derived therefrom when operated by the owner. The act should be so construed that the tax will rest uniformly upon all such property by whomsoever operated. This result can be reached only by construing the act as I have done.

Turning now to section 1 of the act, we find the same idea expressed. The tax there is denominated a tax upon the corporate franchise or business in this state of a railroad. The most valuable franchise, and pretty much the only one of pecuniary value, is the rights conferred by the state on such corporations to locate, build, maintain, own, and operate a railroad with its rolling stock in this state. Every railroad in the state holds these franchises from the state. Here it is declared that the tax is upon the franchise. When "or business in this state" is added, it suggests that the franchise is to be valued upon the basis of the earnings received from the operation of the property. On this construction section 11 of the act declares that the value of the railroad, rolling stock, and right to operate them in this state is, for the purpose of taxation, to be determined by the gross earnings derived from such operation thereof per mile within this state. Section 12 rates the tax upon the property or franchise so valued, and section 13 declares when the tax shall be paid. This construction makes all the provisions of the act on this subject harmonious, renders the tax a tax upon the property or franchise, to be paid by the owner of the property or franchise, and avoids all constitutional objections. I do not find anything in *Philadelphia & S. Steam-Ship Co. v. Pennsylvania*, *supra*, nor in any of the decisions there referred to and commented upon, which militates against this construction of this act. In the *State Freight Tax Case*, 15 Wall. (U. S.), 232-282, Justice STRONG says: "Before proceeding, however, to a consideration of the direct question whether the statute is in direct

Statute not in
conflict with
decision of U.
S. court.

conflict with any provision of the constitution of the United States, it is necessary to have a clear apprehension of the subject and nature of the tax imposed by it. It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York*, 2 Black (U. S.), 620; *Tax Bank Case*, 2 Wall. (U. S.), 200; *Society for Savings v. Coite*, 6 Wall. (U. S.), 594; and *Providence Institution v. Massachusetts*, 6 Wall. (U. S.), 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decision turned upon the questions: What was the subject of the tax? Upon what did the burden really rest?—not upon the question from whom the state exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank it was sustained." I understand the principle thus announced is unquestioned. My associates make this a tax upon the gross earnings, in the first part of the opinion, and then by some process of reasoning, of which I fail to see the force or conclusiveness, hold that it is a tax upon the orator, analogous to the tax imposed upon the orator's roadbed per mile, under the acts of 1874 and 1876, and decided by this court in *Rutland county*, but unreported, and which method of taxation this took the place of. They also hold, as I understand the opinion, that the gross earnings derived from the operation of the orator's railroad and property by the defendant belong to the defendant, and yet that the tax rests upon the orator. I am unable to understand in what way that result can come about, unless the tax rests upon the orator's roadbed, rolling stock, and right to operate them, valued upon the basis of the gross earnings derived per mile from its operation in this state by the defendant. When the tax is made to rest upon the orator, who has no gross earnings within the meaning of the act, it falls within the principle announced and quoted from the opinion of Justice STRONG, in the *State Freight Tax Case*, and is not unconstitutional. The burden of the tax, on the views of my associates, rests upon the orator. As the orator derives no gross earnings from its railroad, the tax, it seems to me, must either rest upon the railroad property or franchises of the orator. It must rest upon what the orator owns and enjoys, and not upon what it does not own, and is not entitled to. While I agree in the result reached by the majority of the court, I dissent from the method of reaching it, and from holding the act unconstitutional.

Taxation of Earnings of Railroad Companies.—See *Little Miami, etc. R. Co. v. United States*, (U. S.) 13 Am. & Eng. R. Cas. 330; *State v. Pullman P. Car. Co.*, (C. C.) 13 *Id.* 307; *State v. St. Paul, etc. R. Co.* (Minn.) 13 *Id.* 663; *Worth v. Wilmington & W. R. Co.*, (N. Car.) 13 *Id.* 286; *State Treasurer v. Auditor General*, (Mich.) 13 *Id.* 296; *Fargo v. Auditor General*, (Mich.) 22 *Id.* 216; *Fargo v. Stephens, Auditor General*, (U. S.) 31 *Id.* 452; *Sioux City, etc. R. Co. v. United States*, (U. S.) 17 *Id.* 480; *Note* 33 *Id.* 448; *State v. St. Paul Union Depot Co.*, (Minn.) 41 *Id.* 636; *Baltimore Union Pass. R. Co. v. Baltimore*, (Md.) 41 *Id.* 646; *note* 39 *Id.* 542.

Taxation of Leased Road.—The privilege of exemption from taxation does not pass to the lessee of a railroad company. *Alexandria, etc. R. & B. Co. v. District of Columbia*, (D. C.) 7 Am. & Eng. R. Cas. 325.

MASSAVILLO

v.

NASHVILLE & KNOXVILLE R. CO.

(*Tennessee Supreme Court, February 14, 1891.*)

Excessive Damages—Remittitur—New Trial.—In an action for personal injuries the jury rendered an excessive verdict. The trial court entered a *remittitur* under protest and over the objection of the plaintiff. Both parties appealed. *Held*, that the action of the trial court in rendering a *remittitur* under protest was erroneous, its authority merely extends to suggesting a *remittitur*; but this court, agreeing with the trial court that the verdict is excessive, will grant a new trial.

APPEAL from Wilson County Circuit Court.

E. I. Golladay and *Lillard Thompson*, for plaintiff.

Tarver & Golladay, for defendant.

LEA, J.—The plaintiff, Massavillo, brought suit against the defendant railroad company for damages for personal injuries. The jury rendered a verdict for plaintiff Case stated. for \$5,500. The defendant moved the court for a new trial, assigning several causes as reasons therefor. The court overruled all the causes except the one which assigned that the verdict was excessive, and stated "that ground was well taken, in the judgment of the court, and the court would grant a new trial for this cause, unless the plaintiff will remit the sum of \$2,500;" but, "if the plaintiff will remit the sum of \$2,500, the judgment for \$3,000 will be allowed to stand." The "verdict is for too large an amount, in the opinion of the court, and the remitter should be made." Thereupon plaintiff moved the court for leave to remit \$2,500 "under protest, and excepted to the action of the court." And thereupon the plaintiff was allowed to remit said sum "under protest," excepting to the ruling and action of the court, and appealed from so much of his judgment as required him to remit. The defendant appealed, and both have assigned errors.

The action of the court was erroneous. The action of the court was virtually compelling the plaintiff to remit, when plaintiff would only remit under protest and objection. The court should have granted a new trial, being satisfied, as he said, the judgment was excessive. We would not be understood as intimating that the court might not suggest a remitter, and, if plaintiff accepted it without protest or objection, then, on application of plaintiff to remit, a new trial might be refused; but a remitter "under protest, and over the objection" of plaintiff, should not be entered. If the plaintiff was unwilling to enter a remitter, as suggested by the court, then he should have declined, and, if the court granted a new trial, might have taken a bill of exceptions, and upon another trial, if dissatisfied with the result, brought the case to this court for review. We therefore hold that the court erred in receiving the application to remit under protest.

Remittitur
under protest
erroneous.

Now, the result is that the verdict for \$5,500 remains against the defendant, and with the declaration of the trial judge, as stated in the bill of exceptions, "that the sum is excessive, and that he would grant a new trial if the plaintiff would not remit." The plaintiff, as we hold, did not remit, and by his action the trial judge has not exercised his discretion, and we will therefore do what he says he would do if the remitter was not entered, to-wit, grant the defendant a new trial, as we agree with the court below that the judgment is excessive, and shows there was passion and prejudice. The case will be remanded for a new trial, and plaintiff will pay the costs of this court.

Verdict excessive—New trial granted.

Excessive Damages in Actions for Personal Injuries not Resulting in Death.

—It is a matter of most frequent occurrence for juries in actions for personal injuries, especially where the defendant is a railroad company or other corporation, to award the plaintiff damages to an amount largely in excess of the actual damages suffered. Concerning this tendency Chief Justice BLECKLEY of the supreme court of Georgia, in the case of *Western & A. R. Co. v. Young*, 83 Ga. 512, 42 Am. & Eng. R. Cas. 135, says: "Only a qualified or relative compensation is possible; and the law, which is always practical, never visionary, contemplates the latter, not the former. It recognizes the restrictions imposed by many considerations, such as the limited wealth of the country, and the necessity of sparing the existence of industrial contrivances and agencies for carrying on great departments of business. In the absolute sense, damages equivalent to all the assets of a railroad company might not be excessive, nor even adequate, for a serious personal injury resulting from its negligence; but, in any practical sense, the damages in each case must be graduated so that there may be railroads left in existence, and so that all like injuries occasioned by their use may be compensated in some reasonable degree. For a few injured persons to recover amounts not so graduated would perhaps, in the end, leave nothing with which to compensate others having claims equally as

strong and meritorious. We fear that juries often aim at too high a standard of damages where corporations have to pay them. Our observation is that in corporation cases the amounts found are very frequently too great, but rarely, if ever, too small. It is not a healthy state of public feeling and opinion when, through affairs of justice, a strong current runs either against or in favor of a particular class of suitors. Every thoughtful man knows that nothing is so essential in meting out justice as rigid impartiality; that is, freedom from prejudice on the one hand, and from undue sympathy on the other. Not only theoretically, but actually and practically, the law is no respecter of persons; neither should be its ministers. No man can fitly administer law in its true spirit, either from the bench or the jury box, without being as impartial as the law itself. In damage cases of the sort now under consideration, the law trusts implicitly the enlightened conscience of impartial jurors, and courts can relieve against excessive verdicts only where impartiality is to be gravely questioned, but they can and should do so in every case where departure from this prime virtue is manifest."

In this note we collect the cases showing what the courts consider excessive damages for personal injuries warranting a new trial, and what damages they have allowed.

Damages held excessive.

\$200 excessive for injury to passenger consisting of cut in lip, for treating which physician charged \$5.00. *Texas & Pac. R. Co. v. Doherty*, (Texas Ct. of App. Nov. 8, 1890), 15 S. W. Rep. 43.

\$700 excessive, plaintiff not being entitled to exemplary damages, and jury returning verdict for actual damages done to passenger by starting of train was \$300. *Atchison, T. & S. F. R. Co. v. Harvey*, 31 Kan. 750, 16 Am. & Eng. R. Cas. 352.

\$1841.67 excessive for injuries on a highway, breaking plaintiff's leg. *Sheff v. Huntington*, 16 W. Va. 307.

\$2,500 excessive for injury to young woman in the knee and leg which did not affect her walking naturally and gracefully, and it not being probable that the injury was permanent. *Chicago, R. I. & P. R. Co. v. Bayzant*, 87 Ill. 125.

\$2,500 excessive for injury consisting of sprained ankle confining plaintiff for two weeks and compelling him to go around on crutches two or three weeks longer. *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580.

\$3,000 excessive for injury to woman causing miscarriage. Verdict reduced to \$500. *Houck v. Southern Pac. R. Co.*, 38 Fed. Rep. 226.

\$3,638 excessive for injury caused by fall rendering plaintiff unconscious for two or three days and keeping him in the hospital for three months with wounds healed, although he complained of sore back. *The Grecian Monarch*, 32 Fed. Rep. 365.

\$800 excessive for fracture of thigh. *Young v. Glasgow, etc. R. Co.*, 20 Scottish Law Reporter, 169.

\$4,000 excessive for injury consisting of fracture of small bone of leg at the ankle and a rupture of some of the ligaments. *South Covington & C. R. Co. v. Ware*, (Ky.) 27 Am. & Eng. R. Cas. 206.

\$4,000 excessive for injury consisting of broken leg, there being no permanent injury. Verdict reduced to \$2,500. *Lombard v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 494.

\$4,400 excessive for injury consisting of complete dislocation of the thumb. The thumb was turned back, the second joint protruding, and the bone was sticking out, but there was only a little fracture. The thumb required care for six weeks and caused a good deal of pain. *Chicago, B. & Q. R. Co. v. Avery*, 10 Bradw. (Ill. App.) 210.

\$4,500 excessive where verdict was in favor of parent as damages for

loss sustained through disabling of child ten years of age. *Hurt v. St. Louis, I. M. & S. R. Co.*, 94 Mo. 255, 34 Am. & Eng. R. Cas. 422.

\$4,500 excessive for fracture of an arm run over by a street car. The only proof of the lasting character of the injury being that of the plaintiff and a fellow laborer. *Chicago, W. D. R. Co. v. Hughes*, 87 Ill. 94.

\$5,000 excessive where principal injury was laceration of right arm, impairing circulation and causing arm and hand to wither. It was not shown that the injury was permanent. Amount reduced to \$3,000. *Village of Orleans v. Perry*, 24 Neb. 831.

\$5,000 excessive where plaintiff lost one month's work and his injuries consisted in a straining of the ligaments of the finger and a weakening of one lung. *Union Pac. R. Co. v. Hand*, 7 Kan. 380.

\$5,000 excessive where plaintiff's principal injury was to the kidneys, and the straining of some ligaments. He used crutches for about nine months and would be from two to four years recovering. *Chicago, R. I. & P. R. Co. v. McKittrick*, 77 Ill. 619.

\$5,875 held outrageously excessive where plaintiff's team was injured and he lost the toes off his left foot. *Chicago, R. I. & P. R. Co. v. McKean*, 40 Ill. 318.

\$6,000 excessive for injury consisting of breaking of forearm and making plaintiff unable to work for four or five months, and then able to earn only \$2.25 per day, whereas he had formerly received \$2.50 per day. *International & G. N. R. Co. v. Hall*, (Texas, Nov. 25, 1890,) 15 S. W. Rep. 108.

\$6,000 excessive for temporary injuries to woman depriving her for a time only of the opportunity to earn \$9.00 a week. *Langley v. Sixth Ave. R. Co.*, 48 N. Y. Sup. Ct., 542.

\$6,000 excessive for injury consisting of broken leg and head somewhat injured. The injured leg when healed was somewhat shorter than the other. Amount reduced to \$4,000. *Clapp v. Hudson, etc. R. Co.*, 19 Barb. (N. Y.), 461.

\$6,000 excessive for personal injuries where at two previous trials verdicts had been for \$3,000 and \$2,500. *Baker v. City of Madison*, 62 Wis. 137.

\$6,500 excessive for injury to brakeman causing loss of thumb and one finger and laying him up a little over a month. *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 169, 11 Am. & Eng. R. Cas. 260.

\$6,600 excessive for fracture of child's arm resulting in permanent disfigurement. Amount reduced to \$3,000. *Ryder v. New York*, 50 N. Y. Sup. Ct., 220.

\$6,900 excessive for injury to passenger consisting of bruises about the shoulder and head, and a scalp wound which quickly healed, and a shock to the nervous system. *Sawyer v. Hannibal, etc., R. Co.*, 37 Mo. 240.

\$7,000 excessive for injury to healthy child producing impairment of nervous system, causing her to become an invalid and subject to headaches and attacks of nausea, and frequent fainting and fits. *Lapleine v. Morgan's La. & Tex. R. & S. S. Co.*, 40 La. Ann. 661, 37 Am. & Eng. R. Cas. 348.

\$7,000 excessive where plaintiff was thrown on her back in a car and rendered unconscious for a long time, and her left arm and leg made numb, and the movement of the fingers of her left hand causing sharp pain. She also suffered spinal and internal injuries. *Abbot v. Tolliver*, 71 Wis. 64.

\$8,000 excessive for injury to a cooper and teamster resulting in loss of a hand. Verdict set aside unless consent given to reduction to \$6,000. *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.), 196.

\$8,000 excessive for injuries where at former trial verdict was for \$2,000. *McLimans v. City of Lancaster*, 63 Wis. 596.

\$9,000 excessive for injuries depriving plaintiff of use of his right arm.

and otherwise affecting him. Judgment reversed except on *remittitur* of \$3,000. *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394.

\$9,250 excessive for injury to spinal column of man twenty-five years old. New trial ordered unless *remittitur* of \$3,000 was filed. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 18 Am. & Eng. R. Cas. 68.

\$10,000 excessive for an injury to an old man run down by a street car, the injury consisting of an impairment of the bones of the hip, causing a shortening of the leg and rendering him permanently lame. *Chicago W. D. R. Co. v. Haviland*, 12 Brad. (Ill. App.) 561.

\$10,000 excessive for injury to brakeman twenty-four years of age resulting in amputation of left leg. *Missouri Pac. R. Co. v. Dwyer*, 36 Kan. 58.

\$10,000 excessive where plaintiff was a day laborer not wholly disabled, and the negligence was not reckless. Judgment reduced to \$4,000. *Illinois Cent. R. Co. v. Ebbert*, 74 Ill. 399.

\$10,000 excessive for personal injuries where there was evidence that plaintiff was guilty of contributory negligence. *Central R. Co. v. Smith*, 76 Ga. 209.

\$10,000 excessive, even for punitive damages, for injuries to a passenger received by being thrown from her seat to the floor of the car, and consisting of external bruises and a nervous shock. Plaintiff was confined to her bed for seven or eight weeks, and one of her legs had become partially paralyzed. *Louisville S. R. Co. v. Minogue* (Ky.), 14 S. W. Rep. 357.

\$10,000 excessive, and reduced to \$5,000 where a woman was injured by having her leg broken, her arm dislocated, and her back, shoulder, and side injured. She was not able to walk for four months, and at the end of two years had not recovered. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 311, 42 Am. & Eng. R. Cas. 34.

\$11,000, verdict for, held a proper case for the interference of the court, the amount being more than double the amount which could have been awarded if the accident had proved fatal. *Collins v. Albany & S. R. Co.*, 12 Barb. (N. Y.), 492.

\$12,000 excessive where passenger was ejected from car with violence whereby he received severe bodily injuries. Amount reduced to \$7,000. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314.

\$12,000, although reduced by permission of plaintiff's counsel to \$10,000, for injuries resulting in loss of hand by brakeman, held grossly excessive. Judgment all remitted except \$4,000 affirmed. *Brown v. So. Pacific R. Co.* (Utah, April 18, 1891), 26 Pac. Rep. 579.

\$13,500 excessive for injury to leg below the knee, healing taking place within five months, and leaving it a little shorter than the other. Some injuries were received about the head. Physician's bill was \$750. Amount reduced to \$7,000. *Coppins v. New York Cent. & H. R. R. Co.*, 48 Hun (N. Y.), 262.

\$14,833 excessive for breaking leg and causing permanent injury, plaintiff being twenty-one years of age. *Southwestern R. Co. v. Singleton*, 66 Ga. 252.

\$15,000 excessive for loss of right arm near shoulder. Amount reduced to \$10,000. *Silberstein v. Houston, W. St. & P. F. R. Co.*, 4 N. Y. Supp. 843.

\$15,000 excessive for injuries to a woman fifty-three years old, who was injured in a wreck, and probably crippled for life owing to an injury to the spine. Judgment affirmed on condition of a *remittitur* of \$5,000. *Furnish v. Missouri Pac. R. Co. (Mo.)*, 13 S. W. Rep. 1044.

\$18,000 excessive for injury to brakeman owing to car passing over his legs crushing them so that amputation was necessary. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492.

\$20,000 excessive for injury to minor decreasing his ability to labor. *Texas & Pac. R. Co. v. Morin*, 66 Tex. 133, 25 Am. & Eng. R. Cas. 539.

\$20,750 excessive for injury to man fifty-four years of age causing amputation of foot. Medical attendance cost \$800. Verdict reduced to \$10,750. *Kennon v. Gilmer*, 9 Mont. 108.

\$25,000 excessive where injuries where not permanent although severe, causing great pain. Verdict reduced to \$5,000. *Peyton v. Texas & Pac. R. Co.*, 41 La. Ann. 861, 41 Am. & Eng. R. Cas. 550.

\$25,000 excessive for an injury rendering a person a cripple for life. *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265.

\$30,000 excessive for injury sustained from fall of suspended bucket. \$10,000 remitted. *Columbus, Hocking Valley, etc. v. Shannon*, 4 Ohio Circuit Court, 449.

\$30,000 excessive for injuries to young boy necessitating amputation of both legs. *Heddles v. Chicago & N. W. R. Co.*, 74 Wis. 239, 39 Am. & Eng. R. Cas. 645.

\$35,000 excessive where in collision plaintiff's right foot and ankle were crushed so that leg had to be amputated below the knee. Left leg was badly bruised, bones separated, and ligaments ruptured. Plaintiff spent about \$5,000 for treatment. *Louisville, etc. R. Co. v. Fox*, 11 Bush (Ky.), 500.

Damages Held not Excessive.

\$400 not excessive where passenger was disabled by injury for several weeks. *Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278, 16 Am. & Eng. R. Cas. 330.

\$400 not excessive for injuries received from defective sidewalk, the verdict not appearing at first blush to be grossly excessive. *City of Aurora v. Bitner*, 100 Ind. 396, 8 Am. & Eng. Corp. Cas. 571.

\$500 not excessive where a passenger was expelled from train on a dark night, compelled to walk over bridge half a mile long, and became seriously sick. *International & G. N. R. Co. v. Wilkes*, 68 Tex. 617, 34 Am. & Eng. R. Cas. 331.

\$500 not excessive for injuries to woman fifty-five years old, injured so that she was confined to her bed for months, and who suffered great pain. Plaintiff was able to earn from \$8 to \$10 a month previous to accident. *Atlanta & W. P. R. Co. v. Smith*, 81 Ga. 690.

\$500 not excessive where plaintiff was merely considerably bruised by being thrown from train, but suffered no serious injury. *East Line & R. R. Co. v. Lee*, 71 Tex. 538.

\$530 not excessive for injury to plaintiff's son sixteen years of age, rendering him unconscious for a time and disabling him for weeks. *Indianapolis & V. R. Co. v. McLin*, 82 Ind. 435, 8 Am. & Eng. R. Cas. 237.

\$550 not excessive where one of plaintiff's fingers was mashed off and another badly hurt, disabling him for work for five months. *Georgia Pac. R. Co. v. Rigden*, 85 Ga. 867.

\$600 not excessive where passenger was illegally expelled and forced to walk several miles, suffering considerable physical pain. *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 11 Am. & Eng. R. Cas. 109.

\$600 not excessive for injuries producing pain in legs lasting three weeks, but not permanent. *Fell v. Northern Pac. R. Co.*, 44 Fed. Rep. 248.

\$600 not excessive for serious injuries resulting in considerable suffering, expense and loss of time, producing impairment of health and lessening capacity to earn money. *King v. City of Oshkosh*, 75 Wis. 517.

\$700 not excessive for great bodily injury to woman, causing her to have miscarriage. *Michigan City v. Ballance*, 123 Ind. 334.

\$700 not excessive for injury to passenger assaulted by brakeman who struck and bruised his face and head. *St. Louis & S. F. R. Co. v. Blackburn*. (Ark. Feb. 1891), 15 S. W. Rep. 469.

\$750 not excessive where plaintiff suffered three months. *Ryan v. Knickerbocker S. S. Co.*, 8 N. Y. Supp. 471.

\$966.66 not excessive for injuries to a foot to some extent permanent and very painful for several weeks. *Schroth v. City of Prescott*, 68 Wis. 678, 18 Am. & Eng. Corp. Cas. 247.

\$1,000 not excessive for injuries to middle aged woman consisting in the breaking of an arm. *New York, C. & St. L. R. Co. v. Doane*, 115 Ind. 435, 37 Am. & Eng. R. Cas. 87.

\$1,000 not excessive for injuries to a woman, consisting of a broken leg, which confined her to her bed for nine weeks, causing great pain which might become permanent. *Mayor, etc. of Birmingham v. Lewis*, (Ala. April 29, 1891), 9 So. Rep. 243.

\$1,000 not excessive for injury to woman forty-five years old, disabled by the accident for three or four months, and sustaining some permanent injuries. *Fleming v. Town of Shenandoah*, 71 Iowa, 456, 18 Am. & Eng. Corp. Cas. 257.

\$1,250 not excessive where passenger was injured and disabled for four months. *Memphis & Little Rock R. Co. v. Stringfellow*, 44 Ark. 322, 21 Am. & Eng. R. Cas. 374.

\$1,400 allowed for an injury breaking plaintiff's leg at the hip, and causing material shortening. *Gale v. New York Cent. R. Co.*, 53 How. Pr. (N. Y.) 385.

\$1,500 not excessive in an action by a father for injury to boy eleven years old, necessitating amputation of a portion of the leg. *Lang v. New York, Lake Erie & W. R. Co.*, 51 Hun, (N. Y.) 603.

\$1,500 not excessive where plaintiff had two teeth knocked out, was injured internally, had the ligaments of his ankle joints lacerated, had his arm broken and kept in a sling for nearly a year, and at the time of the trial, more than three years after, still suffered great pain. *City of Griffin v. Johnson*, 84 Ga. 279.

\$1,500 not excessive for injuries producing a more aggravated condition of hernia than had before existed. *Houston & T. C. R. Co. v. Schafer*, 54 Tex. 641, 6 Am. & Eng. R. Cas. 421.

\$1,500 not excessive for injuries to plaintiff's leg in all probability permanent. *Garlick v. City of Pella*, 53 Iowa, 646.

\$1,600 not excessive for injury to an old farmer who was healthy previous to the injury but which was permanent and would practically disable from labor during the remainder of his life. *Duffy v. Chicago & N. W. R. Co.*, 34 Wis. 188.

\$1,700 not excessive for injuries to fireman by steam and hot water from derailed engine. *Delie v. Chicago & N. W. R. Co.*, 51 Wis. 400, 5 Am. & Eng. R. Cas. 464.

\$1,800 not excessive where plaintiff as result of injuries was lame and nervous for two years, and had his eyesight impaired. *Bridge v. City of Oshkosh*, 71 Wis. 363.

\$2,000 not excessive for permanent injury inflicting great pain from when it was received until a long time afterwards. *Texas, etc. R. Co. v. Lowry*, 61 Tex. 149.

\$2,000 not excessive for injuries received from assault by conductor, plaintiff having been badly bruised and cut, and his arm broken. *Savannah St. & R. R. Co. v. Bryan*, (Ga. Dec. 10, 1890), 12 S. E. Rep. 307.

\$2,000 not excessive for broken leg causing a permanent injury largely incapacitating plaintiff for labor. *Driess v. Frederick*, 73 Tex. 460.

\$2,000 not excessive for permanent loss of the use of an arm. *Little Rock & Ft. S. R. Co. v. Harkey*, (Ark. Jan. 1891), 16 S. W. Rep. 456.

\$2,000 not excessive for injury to a woman causing a miscarriage. *Joliet v. Conway* 17 Ill. App. 577.

\$2,000 not excessive where plaintiff was injured by being run into by

defendant's train, necessitating the amputation of two toes and incurring a permanent injury to his leg. *Norfolk & W. R. Co. v. Burge*, 84 Va. 63, 32 Am. & Eng. R. Cas. 101.

\$2,000 not excessive for loss of services of plaintiff's infant son who had lost part of his right leg. *Akersloot v. Second Ave. R. Co.*, 8 N. Y. Supp. 926.

\$2,000 not excessive for incurable affection of spinal cord causing permanent suffering. *Waldron v. St. Paul*, 33 Minn. 87.

\$2,000 not excessive for injury to young farmer able to earn \$300 a year, whose arm was broken, and who suffered in the arm, breast, back, and kidneys, and whose capacity to labor was impaired from 50 to 75 per cent. *Northeastern R. Co. v. Chandler*, 84 Ga. 37.

\$2,300 not excessive for injuries resulting in amputation of thumb and two fingers. *Whalen v. Chicago, R. I. & P. R. Co.*, 75 Iowa, 563, 38 Am. & Eng. R. Cas. 141.

\$2,500 not excessive for severe injuries to passenger, although there was some conflict in the evidence of the medical witnesses as to the character of his injury. *Gulf C. & S. F. R. Co. v. Smith*, 74 Tex. 276.

\$2,250 not excessive for injury confining healthy woman to her bed for six months and imposing suffering for four years. *Smalley v. City of Appleton*, 70 Wis. 340.

\$2,500 not excessive for permanent injury which required medical attendance for some time; evidence showing that plaintiff was more apt to suffer from other ailments than if she had not been injured. *Crank v. Forty-Second St., etc., R. Co.*, 53 Hun (N. Y.), 425.

\$2,500 not excessive where the evidence tended to prove a very severe injury probably permanent in its character. *Maloy v. New York Central R. Co.*, 40 How. Pr. (N. Y.), 274.

\$2,500 not excessive for injuries received by plaintiff running against hand car placed upon highway. *Pittsburg, C. & St. L. R. Co. v. Sponier*, 85 Ind. 165, 8 Am. & Eng. R. Cas. 453.

\$2,725 not excessive for injuries to woman producing pains in back, loss of memory, paralysis of one side for three or four weeks, and some hemorrhage, with a tendency to miscarry. *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, 42 Am. & Eng. R. Cas. 87.

\$3,000 not excessive for injury to woman forty-five years of age, caused by her falling on her head, producing a depression of the skull. Plaintiff's right side was also hurt and one knee joint, so as to make her lame, and at times unable to step. *Montgomery v. Long Island R. Co.*, 6 N. Y. Supp. 178.

\$3,000 not excessive for injuries to plaintiff's leg which a year and a half after the accident was still affected and attended with pain. *Gulf, C. & S. F. R. Co. v. Norfleet*, 78 Tex. 321, 45 Am. & Eng. R. Cas. 207.

\$3,000 not excessive for loss of three fingers. *Neilon v. Marinette & M. R. Co.*, 75 Wis. 579.

\$3,000 not excessive for injuries to female passenger carried past her destination and compelled to walk back and who was sick for several days as a result of the excitement. *Louisville & N. R. Co. v. Ballard*, (Ky.) 10 S. W. Rep. 429.

\$3,200 not excessive for permanent injury entailing great bodily and mental pain and suffering. *Griffiths v. Clift*, 4 Utah, 462.

\$3,300 not excessive for injury to child two and a half years old where the bones of the leg were laid bare, the skin and flesh being laid open for two or three inches, there being a complete fracture of the large bone a little above the ankle. The physicians testified that the deformity imposed would increase as plaintiff grew older. *Hyland v. Yonkers R. Co.*, 4 N. Y. Supp. 305.

\$3,500 not excessive for injury resulting in great bodily pain, and affecting spine and limbs. *Knutts v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 642, 11 Am. & Eng. R. Cas. 639.

\$3,500 not excessive for injuries to child ten years old caused by railway turntable. *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103.

\$3,500 not excessive for injuries causing plaintiff to go on crutches for four months, and rendering him unable to attend to business. Injury caused great pain, and in the opinion of a physician might become permanent. *Haniford v. City of Kansas* (Missouri, Feb. 2, 1891), 15 S. W. Rep. 753.

\$3,500 not excessive for injuries to woman whose hip was permanently injured, and her leg shortened, besides other inconveniences. *McDonald v. City of Ashland*, (Wis. Dec. 16, 1890), 47 N. W. Rep. 434.

\$3,500 not excessive for injuries to woman disabling her for life and causing incurable hernia. *Calder v. Smalley*, 66 Iowa, 219, 7 Am. & Eng. Corp. Cas. 20.

\$3,750 not excessive for injury to man sixty-two years old, who had three ribs broken and his side bruised, the evidence as to his ultimate recovery being conflicting. *Missouri Pac. R. Co. v. Aikin*, 71 Tex. 373.

\$4,000 not excessive for injury consisting of flesh being torn from thumb and finger. *Galveston Oil Co. v. Malin*, 60 Tex. 645.

\$4,000 not excessive for painful injuries of a temporary character, and for spinal injury likely to prove permanent. *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165, 37 Am. & Eng. R. Cas. 194.

\$4,000 not excessive for injury causing severe pain for months, and from which plaintiff had not recovered at the time of the trial, three years after the accident. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401.

\$4,000 not excessive for loss of hand. *Withcofsky v. Wier*, 32 Fed. Rep. 301.

\$4,000 not excessive where before accident plaintiff was a strong, healthy woman with a florid complexion, and afterwards she was pale and sickly. *Fitton v. Brooklyn City R. Co.*, 5 N. Y. Supp. 641.

\$4,000 not excessive for compound fracture of the left arm and partial dislocation of the elbow resulting in permanent and painful injury. *Van Winter v. Henry County*, 61 Iowa, 684, 2 Am. & Eng. Corp. Cas. 512.

\$4,500 not excessive for permanent disablement of plaintiff's right hand and the pain and suffering endured. *Schultze v. Chicago, M. & St. P. R. Co.*, 48 Wis. 375.

\$4,500 not excessive for injury resulting in loss of an arm. *Mentz v. Second Ave. R. Co.*, 22 Robt. (N. Y.) 356.

\$4,500 not excessive for loss of leg. *Western & A. R. Co. v. Wilson*, 71 Ga. 22.

\$4,500 not excessive for injury to woman, consisting of broken shoulder, causing great pain and resulting in paralysis of arm, and permanent disability. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 44 Fed. Rep. 316.

\$4,680 not excessive for injuries causing disability to work, affecting the breathing and the heart action, and which physician testified would end life in eight years. *Hughes v. Orange Co. M. Assoc.* 56 Hun. (N. Y.) 396.

\$4,700 not excessive for loss of hand. *Central R. Co. v. De Bray*, 71 Ga. 406.

\$5,000 not excessive for injury to switchman so badly crushed as to be unable to perform his usual manual labor, and the evidence tending to show that he would never be able to do any kind of work for which he would receive wages. *Toledo, W. & W. R. Co. v. Fredericks*, 71 Ill. 294.

\$5,000 not excessive for broken leg, and internal injuries permanently affecting general health. *Brady v. Manhattan R. Co.*, 6 N. Y. Supp. 533.

\$5,000 not excessive where plaintiff was so disabled as to prevent him

from pursuing his occupation, and his sufferings were very great. *Morison v. Broadway & S. A. R. Co.*, 8 N. Y. Supp. 436.

\$5,000 not excessive for an injury to an old woman physically sound which caused great pain and impaired the nervous system and incapacitated her for her usual pursuits. *Hinton v. Cream City R. Co.*, 65 Wis. 323.

\$5,000 not excessive for injury to woman fifty-seven years old who lost the free use of one of her arms, had her shoulder and spine injured, and whose general health was impaired. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370.

\$5,000 not excessive where plaintiff suffered permanent physical and mental injury. *Kennedy v. Rochester, etc. R. Co.*, 7 N. Y. Supp. 221.

\$5,000 not excessive for injuries to middle-aged man, probably causing him to suffer more or less during the remainder of his life. *Bitner v. Utah Cent. R. Co.*, 11 Pac. Rep. 620.

\$5,000 not excessive for injury causing shortening of leg, and bowing left leg outward, and making it considerably larger than the right leg. Plaintiff's strength was not materially lessened, but his deformity would always exist. *Metropolitan St. R. Co. v. Moore*, 83 Ga. 453, 41 Am. & Eng. R. Cas. 240.

\$5,000 not excessive where brakeman was caught between freight cars, wholly disabled for nine months, and partially for life, one of his legs being shortened. *Texas, etc. R. Co. v. McAtee*, 61 Tex. 625.

\$5,000 not excessive for injuries confining plaintiff to house for three weeks, compressing his sides, resulting in pneumonia and producing inability to work up to the time of the trial, as well as constant pain. *Hanlon v. Missouri Pac. R. Co.*, (Mo. May 19, 1891), 16 S. W. Rep. 233.

\$5,000 not excessive for injury necessitating amputation of the arm. *Little Rock & F. S. R. Co. v. Cagle*, 53 Ark. 347, 44 Am. & Eng. R. Cas. 536.

\$5,000 not excessive for injury to man aged fifty-four, who was confined to his house for six weeks and had three ribs broken and possibly lamed for life. *Quinn v. Long Island R. Co.*, 34 Hun. (N. Y.) 331.

\$5,000 not excessive for injury to woman causing miscarriage and producing permanent injuries to spine. *Mo. Pac. R. Co. v. White*, (Texas March 10, 1891), 15 S. W. Rep. 808.

\$5,000 not excessive for injury to woman, bruised and otherwise injured, with miscarriage threatened, and who had not been able to attend to household duties for three months after accident. *Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171.

\$5,000 not excessive for injuries to woman fifty-two years old, who would probably be unable to walk for four or five years, \$857 having been paid for medical expenses. *Furnish v. Mo. Pac. R. Co.*, (Mo. Feb. 2, 1891), 15 S. W. Rep. 315.

\$5,000 not excessive for injuries received by passenger having been thrown across seat by violent concussion. Plaintiff's capacity for labor was decreased two-thirds, and he was rendered dull and weakly. Physicians testifying for defendant showed that injuries were probable result of an old trouble. *Richmond & D. R. Co. v. Childress*, (Ga. Nov. 10, 1890), 12 S. E. Rep. 301.

\$5,246 not excessive for injury to passenger resulting from derailment, consisting of wound on back of head, fracture of the clavicle bone, and fracture of several ribs, the scapula thrown out of position, and the lungs injured. Plaintiff was a pension examiner earning \$2,500 a year. So. *Kansas R. Co. v. Walsh*, (Kan. March 7, 1891), 26 Pac. Rep. 45.

\$5,500 not excessive for injury to passenger consisting of a crippled arm. Plaintiff was a cattle dealer and his services were worth from \$150 to \$200 a month. *Ohio & M. R. Co. v. Judy*, 120 Ind. 397.

\$5,500 not excessive where plaintiff's foot was crushed so that he became a cripple by the loss of two toes and several small bones from the instep. *Smith v. Memphis & L. R. R. Co.*, 18 Fed. Rep. 304.

\$6,000 not excessive for loss of three fingers, injuries to wrist and arm, imposing great suffering, although plaintiff earned only \$1.50 a day. *Murtaugh v. New York Cent. & H. R. Co.*, 49 Hun, (N. Y.) 456.

\$6,000 not excessive for total disability for six months, and probably partial disability for life. *Howard Oil Co. v. Davis*, 76 Tex. 630.

\$6,000 not excessive for injury confining plaintiff to his bed eleven months and causing intense pain, the bones of his broken leg having decomposed and compelling removal, leaving him a cripple for life. *East St. Louis & C. R. Co. v. Frazier*, 26 Ill. App. 437.

\$6,000 not excessive for injury depriving plaintiff of use of one hand. *Missouri Pac. R. Co. v. Jones*, 75 Tex. 151, 41 Am. & Eng. R. Cas. 363.

\$6,000 not excessive for injury to brakeman consisting of mashed elbow, cut forehead, instep hurt, eyes injured, and otherwise bruised. *Houston & T. C. R. Co. v. Lowe*, (Tex.) 11 S. W. Rep. 1065.

\$6,040 not excessive for crushing leg. *Central R. Co. v. Crosby*, 74 Ga. 737.

\$6,050 not excessive for injuries received in collision resulting in partial paralysis and inability to resume work, medical expenses having been \$400. *Mellor v. Missouri Pac. R. Co.*, (Mo. Dec. 1, 1890) 14 S. W. Rep. 756.

6,500 not excessive for injury to healthy man forty-four years of age, consisting of a permanent injury to the eye which would result in its loss, and might affect sight of other eye. Plaintiff's vertebræ was also out of line, and he was likely to become a hunchback and paralyzed. *Dallas & G. R. Co. v. Able*, 72 Tex. 150, 37 Am. & Eng. R. Cas. 453.

\$6,933 not set aside as excessive where plaintiff was stunned in an accident, her ribs broken, spine injured, and there were other injuries and she received medical treatment for a long time. *Houston & T. C. R. Co. v. Lee*, 69 Tex. 556, 34 Am. & Eng. R. Cas. 452.

\$7,000 not excessive for injury consisting of loss of arm below elbow, plaintiff being thirty years old with a family to support. *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169.

\$7,000 not excessive for injury to passenger permanently disabling from attending to a profitable business. *Lambkin v. Southeastern R. Co.*, L. R. 5 App. Cas. 352.

\$7,000 not excessive for injury to passenger which resulted in rupture. Plaintiff could not engage in violent exercise and would be deprived of some of his strength, although a physician testified that it would not shorten his life. *Wedekind v. Southern Pac. R. Co.*, 20 Nev. 292.

\$7,000 not excessive where plaintiff's wrist was broken rendering him unable to work for six weeks. *City of Sherman v. Nairey*, 77 Tex. 291.

\$7,000 not excessive for injury to woman sixty-three years old consisting of a fracture of the *femur* causing intense pain, the injury resulting in shortening her leg of which she would never have the full use. *Fitch v. Broadway & S. A. R. Co.*, 10 N. Y. Supp. 225.

\$7,000 not excessive for injury to boy four years of age, causing intense suffering for many months and rendering him a cripple for life. *Ft. Worth St. R. Co. v. Witten*, 74 Tex. 202.

\$7,500 not excessive where both of plaintiff's legs were broken, and his ankle badly dislocated. *Evans v. Delk*, (Texas) 9 S. W. Rep. 550.

\$7,500 not excessive for injuries which might be permanent, consisting of a broken leg which was shortened, and one shoulder lamed, and plaintiff greatly reduced in flesh, so as to be unable to work but half the time. *Hallack v. Johnson*, 12 Colo. 244.

\$7,500 not excessive where plaintiff's foot was cut off crosswise from the

instep to the heel, the leg being scarred and shrivelled nearly to the knee. *Texas & Pac. R. Co. v. Overheiser*, 76 Tex. 437.

\$8,000 not excessive where plaintiff's face was crushed, his lower jaw made immovable, and rendering him a cripple and an invalid for life. *Oties v. Cowles, Electric S. & A. Co.*, 7 N. Y. Supp. 251.

\$8,000 not excessive for injury to healthy girl requiring amputation of limb above knee. *Gulf, C. & S. F. R. Co. v. Stryon*, 66 Tex. 421.

\$8,000 not excessive for injury to plaintiff, a young man, compelling him to submit to surgical operation by which portion of ankle bone was removed. Plaintiff suffered great pain, and had become a cripple for life. *Henry v. Sioux City & P. R. Co.*, 75 Iowa, 84.

\$8,000 not excessive for permanent injury to a farmer fifty-two years old with an expectancy of life of nearly twenty years, the injuries having caused great suffering. *Funston v. Chicago, R. I. & P. R. Co.*, 61 Iowa, 752, 14 Am. & Eng. R. Cas. 640.

\$8,000 not excessive for the loss of a hand. *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167.

\$8,000 not excessive for loss of leg by laborer. *Schumacher v. St Louis & S. F. R. Co.*, 39 Fed Rep. 174.

\$8,000 not excessive for injury which rendered healthy vigorous man diseased, feeble and helpless for life. *Cummings v. National Furnace Co.*, 60 Wis. 603.

\$8,000 not excessive for injuries necessitating amputation of one foot and disabling plaintiff from attending to business for over thirteen months. *Ferguson v. Wisconsin Cent. R. Co.*, 63 Wis. 145, 19 Am. & Eng. R. Cas. 285.

\$8,100 not excessive where a girl seven years of age had one leg cut off and her right hand crushed so as to cause amputation of two fingers, besides being otherwise injured. *Chicago & A. R. Co. v. Murray*, 71 Ill. 601.

\$8,250 not excessive for fracture of several ribs and a puncturing of a lung, causing great suffering and confining plaintiff for several weeks. *Reed v. Chicago, St. P. M. & O. R. Co.*, 74 Iowa, 188.

\$8,500 not excessive for injuries consisting of severance of the nervous connection of the left arm resulting in pain and contraction of the fingers, although plaintiff still had use of his arm to the elbow. *Ridenhour v. Kansas City Cable R. Co.*, (Mo.) 13 S. W. Rep. 889.

\$8,525.87 not excessive for serious and permanent injury to spine of married woman. *Stouter v. Manhattan R. Co.*, 6 N. Y. Supp. 163.

\$8,958 not excessive for injury to a female passenger, her spine being permanently injured, plaintiff being a person of education and a teacher by profession. *Illinois Cent. R. Co. v. Parks*, 88 Ill. 373.

\$9,000 not excessive for wound two inches long and three or four inches deep in side. The wound was serious and permanent and health entirely destroyed. *Western & A. R. Co. v. Lewis*, 84 Ga. 211.

\$9,000 not excessive where plaintiff's leg was broken, compelling him to lay two months before getting up and unable to do anything except on crutches for a year. The broken leg was afterwards shortened and the knee was stiffened. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168.

\$9,000 not excessive where plaintiff suffered injuries that disabled him for life and which caused great suffering. *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 592.

\$9,650 not excessive for leg so crushed that it had to be amputated above the knee. *Nadau v. White River L. Co.*, 76 Wis. 120.

\$10,000 not excessive for injury to brakeman caused by car passing over his legs, there having been two previous trials, the first time a verdict for \$10,000, the second for \$12,000. *Porter v. Hannibal & St. J. R. Co.*, 71 Mo. 66, 2 Am. & Eng. R. Cas. 44.

\$10,000 not excessive for injuries to a locomotive fireman who was fearfully scalded, and confined for two months, and unable to do any hard work for more than a year after the accident; one ear was permanently deafened and his sufferings were excruciating. *St. Louis & S. F. R. Co. v. McClain*, (Texas, March 3, 1891) 15 S. W. Rep. 789.

\$10,000 not excessive for permanent disablement in one leg and shoulder, rendering plaintiff helpless and unable to labor. *Daniels v. Union Pac. R. Co.*, (Utah) 23 Pac. Rep. 762.

\$10,000 not excessive for injury to child nine years of age, rendering him lame for life. *Galveston v. Posnainsky*, 62 Tex. 118, 13 Am. & Eng. Corp. Cas. 484.

\$10,000 not excessive for injuries consisting of loss of a leg at the ankle, causing disability to work for a year, and decreasing earning power, wound being extremely painful. *Taylor v. Mo. Pac. R. Co.*, (Mo. March 11, 1891) 16 S. W. Rep. 206.

\$10,000 not excessive for injuries to brakeman resulting in loss of leg below the knee and confining plaintiff to his room over fifty days while suffering extremely. *Atchison, T. & S. F. R. Co. v. Moore*, 31 Kan. 197, 15 Am. & Eng. R. Cas. 312.

\$10,000 not excessive for injury causing the amputation of a hand. *Union Pacific R. Co. v. Young*, 19 Kan. 493.

\$10,000 not excessive where physician testified that plaintiff would never recover from injuries which left him a physical wreck. *Dalzell v. Long Island R. Co.*, 6 N. Y. Supp. 167.

\$10,000 not excessive where plaintiff was entirely deprived of his health and ability to labor for life. *Columbia & P. S. R. Co. v. Hawthorn*, 3 Wash. Terr. 353.

\$10,000 not excessive for loss of foot. *Louisville & N. R. Co. v. Mitchell* (Ky.) 8 S. W. Rep. 706.

\$10,000 not excessive where plaintiff suffered complete paralysis of the left side. *Osborne v. Detroit*, 32 Fed. Rep. 36, 18 Am. & Eng. Corp. Cas. 230.

\$10,000 not excessive for injury necessitating amputation of an arm, defendant having been guilty of gross negligence. *Robinson v. Western Pac. R. Co.*, 48 Cal. 409.

\$10,000 not excessive for loss of right foot of young man, unfitting him for pursuing his calling. *Bowers v. Union Pac. R. Co.*, 4 Utah, 215.

\$10,175 not excessive for injury to elderly physician earning \$2,500 a year, who was scalded, his nose broken and his teeth knocked out, and three ribs broken, and who was partially paralyzed and in constant pain. *Gratiot v. Mo. Pac. R. Co.*, (Mo. May 19, 1891), 16 S. W. Rep. 384.

\$11,000 not excessive for injuries to laborer necessitating amputation of one leg and incapacitating him for work. *Berg v. Chicago, M. & St. P. R. Co.*, 50 Wis. 419, 2 Am. & Eng. R. Cas. 70.

\$11,000 not excessive for serious injury to man of advanced years entailing confinement for a long time, great suffering and expensive treatment and the amputation of a portion of one of his feet. *Jordan v. New York & H. R. Co.*, 9 N. Y. Supp. 506.

\$11,000 not excessive for injury to young man thirty years of age, permanently disabling him. *Belair v. Chicago & N. W. R. Co.*, 43 Iowa, 662.

\$12,000 not excessive for injury to brakeman, twenty-two years old, who had earned \$60 a month and was unable to work for two years, and his earnings had decreased to \$10 a month. *Trinity & S. R. Co. v. Lane*, (Texas, Feb. 20, 1891), 15 S. W. Rep. 477.

\$12,000 not excessive for injuries to fireman thirty-nine years old rendering amputation of leg necessary and causing great suffering and impairing general health. *Missouri Pac. R. Co. v. Mackey*, 33 Kan. 298, 22 Am. & Eng. R. Cas. 306.

\$12,000 not excessive where manager of telegraph company received injuries necessitating amputation of an arm impairing his efficiency as an operator and putting him to an expense of \$2,000. *Dougherty v. Missouri Pac. R. Co. (Mo.)*, 34 Am. & Eng. R. Cas. 488.

\$12,000 not excessive for fracture of thigh bone and stiffening of knee-joint. Pain suffered could only be remedied by surgical operation at great risk of life. *Texas M. R. Co. v. Douglass*, 73 Tex. 325.

\$12,000 not excessive for injury confining plaintiff to his bed for six weeks, causing him great pain and rendering him unable to attend to business for several months and leaving him permanently lame, and obliging him to spend about \$1,350 for physician's services. *Rockwell v. Third Avenue R. Co.*, 64 Barb. (N. Y.), 438.

\$12,040 not excessive for injury to arm of person dependent on manual labor for support, the injury greatly reducing her earning capacity. *Coast Line R. Co. v. Boston*, 83 Ga. 387.

\$14,167 not excessive for injury to leg, disabling person for life. *Galveston, H. & S. A. R. Co. v. Porfert*, 72 Tex. 344, 37 Am. & Eng. R. Cas. 540.

\$15,000 not excessive for injuries to practising physician almost totally disabling him, where before accident he had earned from \$1,200 to \$1,500 a year. *Pence v. Chicago, R. I. & P. R. Co.*, 79 Iowa, 89, 42 Am. & Eng. R. Cas. 126.

\$15,000 not excessive for injury to miner by accident to his right shoulder and some of his ribs and one of his legs being broken, the leg having to be amputated. *Solen v. Virginia & Truckee R. Co.*, 13 Nev. 106.

\$15,000 not excessive for injuries to young man seventeen years old, breaking his collar bone, compressing his chest, breaking his right arm, and crushing his elbow. Plaintiff's sufferings were severe and his life shortened. *Gulf, C. & S. F. R. Co. v. Dorsey*, 66 Tex. 148, 25 Am. & Eng. R. Cas. 446.

\$15,000 not excessive for loss of both legs by a healthy man, forty-five years of age. *Hobson v. New Mexico & A. R. Co. (Ariz.)*, 28 Am. & Eng. R. Cas. 360.

\$15,000 not excessive for injuries consisting of broken thigh, fractured pelvis, and other permanent injuries. *Louisville, N. O. & T. R. Co. v. Thompson*, 64 Miss. 584, 30 Am. & Eng. R. Cas. 541.

\$15,000 not excessive for injury to engineer incapacitating him from any labor, and depriving him of the sense of hearing. *Texas & P. R. Co. v. Johnson*, 76 Tex. 461, 42 Am. & Eng. R. Cas. 7.

\$16,000 not excessive where plaintiff was permanently injured, and his heart displaced and enlarged. *Georgia Pac. R. Co. v. Dooley*, (Georgia, Dec. 1, 1890), 12 S. E. Rep. 923.

\$18,000 not excessive for loss of leg and loss of use of arm by a man in prime of life. *Murray v. Brooklyn City R. Co.*, 7 N. Y. Supp. 900.

\$20,000 not excessive for injury to a prosperous lawyer of an exceedingly painful and permanent nature, the effects of which would probably continue during his lifetime, and might shorten his existence. *Walker v. Erie R. Co.*, 63 Barb. (N. Y.) 260.

\$20,000 not excessive for injury rendering plaintiff a wreck in mind and body, causing epileptic fits and inability to labor. *International & G. N. R. Co. v. Brazzil*, 78 Tex. 314, 44 Am. & Eng. R. Cas. 437.

\$25,000 not excessive for injury to healthy man rendering him a physical and mental wreck. *Chicago, etc., R. Co. v. Holland*, 18 Ill. 418.

\$30,000 not excessive for injury to a middle-aged vigorous man, producing concussion of the spine and disease which would progress until paralysis and premature death ensued. *Harrold v. New York El. R. Co.*, 24 Hun (N. Y.) 184.

PACIFIC EXPRESS CO.

v.

FOLEY.

(Kansas Supreme Court, May 9, 1891.)

Carriers—Limiting Liability to Particular Amount—Validity of Stipulation.
—Where the receipt or contract of a common carrier contains a stipulation that the company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is stated in such receipt, and where the receipt fails to show any value of the box or goods shipped, the receipt or contract, if fairly and voluntarily entered into, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, when the loss or injury to the box or goods carried results only from slight, common, or ordinary negligence on the part of the carrier, its agents or servants.

The case of *Kallman v. U. S. Express Co.*, 3 Kan. 205, referred to and commented on.

Kansas City, St. Jo. & C. B. R. Co. v. Simpson, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, distinguished, as the carrier in that case arbitrarily and unfairly mixed in the bill of lading or receipt a limitation on the value of the property shipped.

VALENTINE, J., dissenting.

ERROR from District Court, Douglas County.

On the 4th day of November, 1887, Peter T. Foley brought his action against the Pacific Express Company before a justice of the peace of Douglas county to recover \$175, for damages alleged to have been sustained by him in the transportation of a box containing type and electrotype plates from Kansas City, Mo., to Lawrence, in this state, on October 15, 1887, from the A. N. Kellogg Newspaper Company at Kansas City, Mo., by the Pacific Express Company. The following is a copy of the receipt given by the express company for the box in controversy:

“ Read this receipt.

The Pacific Express Company.

“ Not negotiable.

“ Received from —— the following articles, which we undertake to forward to the point nearest to destination reached by this company only, perils of navigation excepted. And it is hereby expressly agreed that the said Pacific Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is herein stated, nor for any loss or damage by fire,

the acts of God, or of the enemies of the government, the restraint of governments, mobs, riots, insurrections, or pirates, or from any of the dangers incident to a time of war; nor upon any property or thing, unless properly packed and secured for transportation; nor for any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money, besides the charge for transportation, is to be collected from consignee on delivery of the property described herein, and the same is not paid within thirty days from date hereof, the shipper agrees that this company may return said property to him, at their option, at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property, while in its possession, for the purpose of making such collection, shall be that of warehousemen only. And it is further agreed that the said Pacific Express Company shall not be held liable for any claim, of whatsoever nature, arising from this contract, unless such claim shall be presented in writing sixty days from date hereof, in a statement to which this receipt shall be annexed; and the shipper and owner hereby severally agree that all the stipulations and conditions in this receipt contained shall extend to and inure to the benefit of each and every company or person to whom the Pacific Express Company may intrust or deliver the above described property for transportation, (which the said Pacific Express Company is hereby authorized to do,) and shall define and limit the liability therefor of such other company or person:

Date, 1887.	Articles.	Value.	Consignee.	Destination.	Receipt by.
Oct. 15.	1 box.		P. T. Foley.	Lawrence, Kansas.	Glass."

On the first page of the receipt book, after the printed words, "Received from," there was written, "A. N. Kellogg N'paper Co.:" and on the following pages nothing was written in the blank after the words, "Received from." Before the commencement of this action, J. K. Johnston, superintendent of the Pacific Express Company, tendered to Mr. Foley for that company \$50, in payment for the damage to the box, but Mr. Foley refused to accept that amount. Trial had before the justice of the peace on November 8, 1887, and the plaintiff recovered judgment for \$144.55 and interest and costs. The action was appealed to the district court. Trial had before the court with a jury at the February term, 1888. The jury returned a general verdict for the plaintiff for \$144.55,

with interest, and also made special findings. Subsequently judgment was rendered upon the general verdict. The defendant excepted, and brings the case here.

A. L. Williams and *Chas. Monroe*, for plaintiff in error.

John Hutchings, for defendant in error.

HORTON, C. J.—The principal question in this case is, what effect is to be given to the following language of the receipt executed by the express company? “It is hereby
Case stated. expressly agreed that the said Pacific Express Company is not to be held liable for any loss or damage, except as forwarders only; nor for any loss or damage of any box, package, or thing for over \$50, unless the just and true value thereof is herein stated.” It appears that the type and electrotype plates were shipped from Kansas City to Lawrence by the A. N. Kellogg Newspaper Company, who, in making the shipment, acted for Peter T. Foley. It also appears that the newspaper company had a receipt book furnished by the express company, and in the heading to each page were printed conditions, and, among others, the one quoted. The newspaper company, having this book in their possession and control, and using it from day to day, must be presumed to have known of its conditions, and to have shipped with reference to it. In this they acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt. The jury made the following special findings in answer to questions submitted to them: “Question. Was not the box containing the type and electrotypes in controversy broken while it was still in the car in which it was brought from Kansas City? Answer. It was found broken in the car. Q. If you should find that said box was broken open by any negligence of the company, state what act or thing caused said box to be broken. A. We do not know. Q. Do the jury know where on the journey the box was broken open? If so, state where. A. We do not know. Q. Were not the agents of defendant negligent in taking the box out of the car? A. Yes. Q. Could they not have saved the contents of the box by handling the box carefully when it was taken out of the car? A. Yes, to the best of our knowledge and belief.

The district court among other things, instructed the jury that “while a common carrier is generally, in the absence of
Charge to jury. any such limitation, liable absolutely, as an insurer, against all loss except that caused by the act of God and the public enemy, it may limit such liability by special conditions such as contained in this receipt, but such special contract cannot relieve the company from its own negligence. It follows that in this case the company is liable,

if at all, not as an insurer, but solely for negligence in the transportation of the property. 'Negligence' is a negative term, implying the want or absence of ordinary care; that is, that care and caution that men of ordinary prudence usually exercise under like circumstances. Whether the defendant company was so negligent, and, if so, whether such negligence caused the injuries complained of, are questions of fact for the jury, to be determined from all the evidence. You should consider the condition of the material when delivered to them; the manner in which it was boxed; the nature of the articles, so far as they could be seen and known by the shipper; the manner in which such property is handled; the condition and circumstances in which it was found at the place of destination; and taking into consideration all the surrounding circumstances and facts proven, and using that ordinary knowledge, observation, and experience in life that men generally possess, you must say whether the loss and injury were attributable to the want of ordinary care and diligence on the part of the express company. If they were, the plaintiff may recover his actual loss; otherwise, he cannot recover beyond the sum of fifty dollars." The express company asked the court to instruct the jury as follows: "(1) The jury are instructed to return a verdict in favor of the plaintiff for the sum of fifty dollars. (2) The agreement in the receipt that defendant will not be liable for more than fifty dollars for any shipment, unless the true value of such shipment is stated in the receipt, is a valid agreement, and relieves the defendant of liability, as insurer for all amounts over fifty dollars, leaving it liable in excess of fifty dollars only for gross negligence, and the burden of proving gross negligence is upon the plaintiff."

1. It is settled by the decisions of this court, and by the great weight of authority, that a common carrier cannot stipulate for exemption from responsibility for the negligence of himself or his servants, on grounds of public policy, even by express contract. Questions in the case. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.), 357, and the cases therein cited; 2 Am. & Eng. Ency. Law, 822. But this is not the question presented by the record in this case. The receipt executed by the express company, and knowingly and voluntarily accepted by the shipper through his agent, expressly provided "that the express company was not to be liable for any loss or damage to the box, for over fifty dollars, if the just and true value thereof was not stated." The true and just value of the box was not stated in the receipt or to the company by the shipper. The trial court very properly instructed the jury "that the shipper

must be presumed to have assented to the terms and conditions of the receipt." Two questions are therefore presented for our determination: *First*. May a common carrier limit his liability to an amount stated in a written receipt or special contract, in the event of loss or injury to the goods or property through ordinary negligence, if such special contract is freely, voluntarily, and fairly entered into by the parties, and such contract is just and reasonable in its terms? *Second*. Did the written receipt or special contract between the shipper and express company in this case limit the liability of the company for loss or injury to the amount of fifty dollars?

The better authorities declare the law to be that the value of the property transported may be agreed upon, and the damage or loss to the property occasioned by the negligence of the company or its servants will be limited to the agreed valuation. The Hart Case, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604, may now be called the leading case in America. Mr. Justice

Power to limit
liability to
agreed valuation.

BLATCHFORD, delivering the opinion of the court in that case, said, among other things that "it is the law of this court that a common carrier may by special contract, limit his common law liability, but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants. * * * There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. * * * The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based upon that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purpose of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to

repudiate it in case of loss." See, also, *Harvey v. Terre Haute, & I. R. Co.*, 74 Mo. 539, 6 Am. & Eng. R. Cas. 293; *Brehme v. Dinsmore*, 25 Md. 329; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178, 35 Am. & Eng. R. Cas. 611; *Duntley v. Boston & M. R. Co.* (N. H., 1890), 20 Atl. Rep. 327; *Magnin v. Dinsmore*, 62 N. Y. 35; *Squire v. New York Cent. R. Co.*, 98 Mass. 239-245; *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33, 16 Am. & Eng. R. Cas. 108; *Hill v. Boston, H. T. & W. R. Co.*, 144 Mass. 284, 28 Am. & Eng. R. Cas. 87; *Falkenau v. Fargo*, 35 N. Y. Super. Ct. 322, 55 N. Y. 642; *Ghormley v. Dinsmore*, 25 N. Y. Super. Ct. 36; *Westcott v. Fargo*, 6 Lans. (N. Y.), 328; *Grace v. Adams*, 100 Mass. 505; *Pemberton Co. v. New York Cent. R. Co.*, 104 Mass. 144. See, also, *Breese v. United States Telegraph Co.*, 48 N. Y. 132, 139, 141, 142; *Richmond & D. R. Co. v. Payne*, 86 Va. 481, 42 Am. & Eng. R. Cas. 366.

As to the second question proposed, we think that the limitation in the written receipt or special contract not to be liable for any loss or damage over \$50, in this case, stands as if the carrier had asked the value of the box and its contents, and had been told by the shipper "that the value was fifty dollars only," or which is the same thing, had been told by the shipper "that, if loss or damage occurred to the box or its contents, he would not demand over fifty dollars." In *Kallman v. United States Express Co.*, 3 Kan. 205, it was said that "no value was given in the bill of lading which was delivered to the shipper by the express company, and received by him without objection; thus consenting and agreeing that the plaintiffs should be bound by its terms. If he had desired to make the company responsible for the full value of the goods, he had only to furnish them with the amount, and have it inserted in the bill. But it may be said that the company was bound to make inquiry as to the value of the goods, if they desired to obtain the benefit of this limitation upon their liability. We confess that we are not able to see any good reason for making such a requirement a condition precedent in such case. The company exhibits to the employer the exact condition upon which they will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more espe-

Shipper
bound by lim-
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ceipt—The
Kallman Case.

cially as the limitation upon the liability of the company was so plainly stated in the receipt." We do not quote this part of the opinion in the above case because it is necessarily conclusive or binding as a prior decision of this court, as, in that case, the trial court granted a new trial. This court affirmed the action of the court below. Much said in the former opinion, outside of affirming the action of the court in granting a new trial, we consider *obiter dictum*. The trial court in that case, in granting the new trial, did not pass upon a pure, simple, and unmixed question of law. This court has decided time and again that "the granting of a new trial is largely in the discretion of the trial court; and where a new trial is given, and the record does not show upon what grounds the court granted such new trial, but the record does show errors upon which the trial court might have granted a new trial, the order granting such trial will not be disturbed." *Barney v. Dudley*, 40 Kan. 247; *Howell v. Pugh*, 25 Kan. 96; *City of Sedan v. Church*, 29 Kan. 190. See *Betz v. Williams & W. L. & L. Co.*, (Kan. 1891), 26 Pac. Rep. 456, (recently decided.) "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious." *Cohens v. Virginia*, 6 Wheat. 264, 399, 400. But we have referred to that part of the Kallman opinion because the court below charged the jury "that the Kellogg Newspaper Company, having this receipt-book in its possession and control, and using it from day to day, must be presumed to have known of such conditions, and to have shipped with reference to it. In this it acted for the plaintiff, and he must be presumed to have assented to the terms and conditions of the receipt;" and because this part of the charge of the trial court and the part of the opinion quoted from the Kallman Case is in accordance with reason, fairness, and justice. This part of the opinion also answers the objection "that the value of the property transported was not agreed upon."

As is forcibly argued by counsel, the express company took the property and signed a receipt presented to it by plaintiff's agent. It is true that it was one of a book of receipts furnished by the express company, but the receipts were all in blank, the printed part containing all the regulations that the express company required the shipper to comply with. The blanks were all left for the shipper to fill in any way he pleased; and in whatever way he filled the blanks the express company

Effect of shipper presenting receipt for signature.

was bound to receipt for the property covered by the receipt. When the shipper had filled the blank and presented it to the express company for its signature, he was in the attitude of proposing an agreement to the express company for acceptance. The signature of the express company was the completion of the agreement, and the agreement as completed so far as it related to the value of the property, was not a limitation of liability for negligence in any way, but a square agreement that the property presented for carriage and covered by the receipt was only worth fifty dollars." In *Oppenheimer v. United States Express Co.*, 69 Ill. 62, the facts were about as follows: May and Stern shipped by the United States Express Company a box weighing 25 pounds, from New York city to Oppenheimer & Co., at Chicago, Ill. It contained jewelry of the value of \$3,800. The receipt given by the express company was similar in that case to the receipt given by the Pacific Express Company in this case. The blank for the value of the box and contents was not filled in. But the limitation of \$50 was in the receipt in that case, as in this. The box and its contents were destroyed by fire in the office of the express company at Chicago. Oppenheimer & Co. brought an action to recover for the value of the contents of the box. Judgment was rendered in their favor for \$50 only. They appealed. The judgment of the lower court was affirmed by the supreme court of Illinois. In rendering its opinion that court said: "The terms and conditions on which the company received the property for transportation were clearly expressed in the body of the receipt, and in a way not calculated to escape attention. It must be supposed that these men paid some attention to the transaction of their business, and were reasonably well informed in regard to the nature of their contracts. That they should have been so, doing business with this company for years, handling, filling out, and procuring the execution of these shipping receipts without a knowledge of their general character and effect, it is difficult to believe. They must be held to have had such knowledge. * * * A distinction exists between the effect of those notices by a carrier which seek to discharge him from duties which the law has annexed to his employment, and those, like the one in question, designed simply to insure good faith and fair dealing on the part of his employer,—in the former case, notice alone not being effectual without an assent to the attempted restriction; while in the latter case, notice alone, if brought home to the knowledge of the owner of the property delivered for carriage, will be sufficient." A part of the syllabus of that case reads: "An express company has the right to demand from

a consignor such information as will enable it to decide on the proper compensation to charge for the risk, and the degree of care to bestow in discharging its trust; and a limitation of its liability, not to exceed \$50, unless the value of the goods forwarded is truly stated, if brought to the knowledge of the consignor, is reasonable and consistent with public policy." The court finally disposed of the above case upon the ground that there was a "designed suppression of the value of the goods." It was said in the opinion, among other things, that "there was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800,' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shipper of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in many cases, [here decisions are given.] Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the safety of the goods, and, as the evidence shows, they would have been saved.

It may be said, in every case, that where a shipper fixes an agreed valuation upon his goods to be transported, or enters into a special contract with the carrier that if his goods are lost or injured he will not demand over \$50, and thereby obtains cheaper rates, he is guilty of fraud, or attempted fraud, if his goods are lost or injured, and he demands for his damages an amount above the valuation or limitation agreed to. If it be true, as the trial court charged the jury, that "the plaintiff must be presumed, under the facts of this case, to have assented to the terms and conditions of the receipt," then, within the better authorities, the limitation of the carrier's liability, not to exceed \$50, was the same as fixing the value of the property transported at \$50 only, and the limitation of the express company's liability, not to exceed the \$50 stated in the receipt, was reasonable and just. *Boorman v. American Express Co.*, 21 Wis. 154, is a case like this. A limitation of \$50 was contained in the receipt. Chief Justice DIXON, writing the opinion, held that "an express company may exempt itself by special contract from liability as insurer; or for the default or negligence of any person to whom the property may be delivered by it, for the performance of any act or duty in respect thereto, off its own routes; or for loss or damage of any package for over \$50, unless the just and true value thereof is stated in the receipt." In *Duntley v. Railroad*, *supra*, it was decided that "a regulation of a carrier

Limitation in
receipt rea-
sonable and
just.

goods are lost or injured he will not demand over \$50, and thereby obtains cheaper rates, he is guilty of fraud, or attempted fraud, if his goods are lost or injured, and he demands for his damages an

with respect to the transportation of live animals, which fixes the ordinary value of horses, for which it will hold itself responsible in case of loss, at \$200 each, and requires extra compensation for transporting animals of greater value, is reasonable and valid." In *Durgin v. American Express Co.*, (N. H., 1890,) 45 Am. & Eng. R. Cas. 325, the receipt was like the one in this case, and limited the liability to \$50. It was held that "a shipper of goods who fills out one of the blank receipts contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto, upon delivering to him a package for transportation, will be presumed to know the contents of the receipt; and, if he receives such receipt without objection, his assent as to its conditions will, in the absence of fraud, be conclusively presumed." CLARK, J., in delivering the opinion in that case, said: "The receipt signed by the defendant's agent and servant at the time of the delivery of the package was taken by the plaintiff as evidence of the fact and purpose of its delivery, and of the terms and conditions on which the defendants received it. The receipt was contained in a book of blank receipts previously furnished by the defendants for the use of the plaintiff, and the written portions were in his handwriting, and the law presumes that the contents were known to him. The plaintiff understood it to be the shipping contract, and, in the absence of fraud, by receiving it without objection, he was conclusively presumed, to assent to its conditions. *Merrill v. American Express Co.*, 62 N. H. 514; *Grace v. Adams*, 100 Mass. 505. It is now generally held that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, where such stipulation is just and reasonable; and a stipulation that the carrier shall be informed as to the value of the goods delivered to him for carriage, as affecting the risk, and the degree of care required, is clearly reasonable. * * * The plaintiff understood that he was securing transportation of the box to New York at a reduced rate, (in fact at one-fifth of the regular rate,) by calling the value \$50, and assuming a portion of the risk of carriage himself; and, having agreed upon a valuation for the purpose of fixing the express charges, he cannot insist that the goods are of greater value, for the purpose of increasing his claim for damages for the loss. Nor is it material whether the loss arose from the negligence of the defendants or some other cause. The defendants agreed to respond in a sum not exceeding \$50 in case of loss, and, for the purpose of the contract of transportation between the parties to the contract, the goods had no greater value." See, also, to the same ef-

fect, *Squire v. New York Cent. R. Co.*, 98 Mass. 239; *Railroad Co. v. Henlein*, 52 Ala. 615; *Magnin v. Dinsmore*, 56 N. Y. 168; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 35 Am. & Eng. R. Cas. 635. In *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312, special contracts for a limitation of the liability of a carrier are not sustained. It is said in that case, among other things, that "to our minds it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so,—the same considerations of public policy operating in each case." In our opinion, the reasons stated are wholly untenable. They proceed upon false premises. That court overlooks the power of the shipper to freely and fairly fix a valuation upon his own property. The carrier has the right to make reasonable rates for carriage. A total exemption from the liability on the part of a carrier would not be just or reasonable, and no person, having reason, would willingly and freely contract with a carrier that the property which he wished to have transported was absolutely worthless. The carrier is bound to receive and transport the property of the shipper. The shipper can place his own valuation upon the property delivered by him to the carrier to be transported. The carrier cannot arbitrarily fix any valuation on the property received from the shipper, but may reasonably insist on proper information as to the value of the property which he receives. He ought to have a right to know what it is that he undertakes to carry, and the amount and extent of his risk. Upon the value of the property, the risk incurred, and the distance the property is to be transported, the charges for carriage are fixed. Therefore it would seem to us that a contract fixing the value of the goods delivered to the carrier, or fixing a limitation of damage in case of loss or injury, is clearly reasonable, as affecting the risk and the degree of care required concerning the property to be transported. With the above and foregoing limitations, we cannot conceive how the carrier can evade his duty or nullify the law. Upon the authorities cited, the instructions of the trial court were erroneous, and the instruction prayed for by the express company for limitation as to damages should have been given.

There is nothing appearing in the evidence or the findings of the jury that show, or tend to show, gross negligence, fraud, or intentional wrong upon the part of the express company. In the case of *Kansas City, St. J. & C. B. R. Co. v.*

Simpson, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158, the limitation was arbitrarily fixed by the carrier without the consent of the shipper. That contract was not just or reasonable, or freely or fairly entered into. It was in violation of public policy. It is unlike this case, because, when the box in controversy was shipped, the shipping clerk of the Kellogg Newspaper Company filled out a receipt, and a man by the name of Glass, a driver for the Pacific Express Company, signed it. No deceit or unfairness was practiced by the express company. In the case of Western Union Telegraph Co. v. Crall, 38 Kan. 679, 21 Am. & Eng. Corp. Cas. 206, gross negligence was involved. Whether a telegraph company could exempt itself by contract from ordinary negligence was not passed upon. That question was reserved. We do not think it is necessary to follow all that was stated in Kallman v. Express Co., *supra*, because, although that decision was made nearly 25 years ago, the question now at issue was not necessarily embraced in that decision, for the reasons heretofore named. The case of Kansas City, St. J. & C. B. R. Co. v. Simpson, *supra*, followed New York Cent. R. Co. v. Lockwood, 17 Wall. (U. S.), 357. This case is referred to and clearly distinguished in the latter case of Hart v. Railroad Co., *supra*. Again, the box containing the type and plates was shipped from Kansas City, Mo. The receipt executed by the express company was executed and delivered at Kansas City, Mo., to the Kellogg Newspaper Company for P. T. Foley, the plaintiff below. In that state the law declared by the supreme court is that "a contract fairly entered into between carrier and shipper, specifying a fixed sum as the value of the property and limiting the recovery in case of loss to that sum, is binding on the shipper." Harvey v. Terre Haute & I. R. Co., 74 Mo. 538, 6 Am. & Eng. R. Cas. 293. We must assume, so far as this case is concerned, that the parties, including the shipper and the express company, contracted with reference to the law of Missouri. The receipt was signed there, the box was delivered there, and was shipped from Missouri to Kansas. It seems to us that the shipper ought not to complain. If he had desired to insert in the receipt, which the express company was asked to sign, \$144.55 as the full value of the box, or if he had desired to insert any larger amount, he had the option so to do, and if he had inserted the full value of the box and its contents he could have recovered the value. But as the shipper voluntarily limited his loss or damage to the sum of \$50 only, why should he refuse to receive the sum of \$50, which was tendered him by the superintendent of the express company when he presented his claim for damages? The re-

Other cases distinguished.

ceipt, as executed, was just as he desired and wished it. The damage in case of loss or injury to the box or its contents was liquidated in advance by the voluntary action of the parties. "The limitation as to the damages or value has no tendency, in such a case as this, to exempt from liability for negligence." *Hart v. Pennsylvania R. Co.*, *supra*. Generally, the charges for transporting a box or package valued at \$144.50, \$500, or \$1,000 are more than when the value is \$50 only, and if the shipper wishes to pay full charges and recover full value, in case of loss or injury from negligence, why should he not state to the carrier, or write in the receipt to be signed by the carrier, the full value? We now repeat what was said upon this point in *Kallman v. United States Express Co.*, 3 Kan. 205, where the receipt was left blank as to the value, as in this case, but where a limitation was inserted in the receipt in case of loss or damage: "The company exhibits to the employer the exact conditions upon which it will receive his property for carriage, to which he may assent or not, as he may choose. If he assent, we think he should be bound thereby. As in this case, if the real value of the property was \$592.53, the employer, in case of loss, would be as much, nay more, interested in having such value truly stated in the bill of lading or receipt as the company could possibly be in having the value understated. He ought, then, to have made known to the company the true value of the goods, and more especially as the limitation upon the liability of the company was so plainly stated in the receipt." The judgment of the district court will be reversed, and the cause remanded for a new trial.

JOHNSON, J., concurs.

VALENTINE, J., (*dissenting*).—I think we should follow the decision made in the case of *Kallman v. Express Co.*, 3 Kan.

205—*First*, because it is right; and, *second*, for the following reasons. It was made on February 17, 1865, more than 26 years ago; the courts have been

**Kallman case
should be fol-
lowed.**

open ever since, and 20 or more sessions of the legislature have intervened, and yet no modification of any of the rules therein enunciated have been made, but all seem to have been acquiesced in; and for these reasons it must be presumed that the parties to this action, and especially the express company, contracted with reference to such rules; and now, to overturn them, and to declare different rules for this case, would virtually be to make a new contract for the parties; and construing the present contract as the contract in that case was construed would render the contract valid, while to construe it as the express company now de-

sires to have it construed would render it void. To construe the contract so as to limit the express company's common law liability only as an insurer, and only for losses and injuries brought about by other causes than the company's own negligence, fraud, or willful wrongs, would render the contract valid; while if it be construed in such a manner as to reach to the domain of negligence, fraud, and willful wrongs on the part of the express company itself, and to limit the company's liability so that the company would not be liable for losses occasioned by its own negligence, fraud, or willful wrongs, would render the contract to that extent invalid and worthless. It must be remembered that in this case the value of the property transported was not agreed upon. Whether it was worth one cent, one dollar, one hundred dollars, one thousand dollars, or any other sum, greater or less, is left wholly blank. There seems to have been no thought of fixing, by contract or otherwise, the actual value of the property, or any value, but it was actually worth \$144.55. In this failure to fix the value of the property by contract, this case differs essentially from the case of *Hart v. Pennsylvania R. Co.*, 112 U. S. 332, 18 Am. & Eng. R. Cas. 604. There are other distinctions between the present case and those relied on by the express company. For instance, the shippers themselves, in some of the cases relied on by the express company, were guilty of fraud or unfair dealing, as in the case of *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 68. In that case the shippers delivered to the express company for transportation a certain box containing watches and jewelry of the value of \$3,800, without disclosing its contents or their great value, and paid only \$1.40 for its transportation; while, if they had disclosed its contents and their value, they would have had to pay \$10.90 for its transportation. The receipt which they took from the express company did not state the contents or the value of the goods, but stated, "Contents unknown." The court, in commenting upon these matters, used the following among other, language: "There was an actual attempt here by the agent of the shippers to fill in this blank space, but, instead of inserting '3,800' (the value), a mark or character was inserted inexpressive of any value. This shows that there was a designed suppression of the value of the goods. That was unfair conduct on the part of the shippers of the goods. The effect of such conduct to relieve the carrier from his liability as insurer is asserted in the cases of—[here certain cases are given.] Had the true value of the goods been disclosed, there would have been an extra charge of \$9.50, increased precautions would have been taken for the

Cases relied on by express company distinguished.

safety of the goods, and, as the evidence shows, they would have been saved." In this case of *Oppenheimer v. Express Co.*, no pretense of fault or negligence on the part of the express company was imputed, but, on the contrary, it was admitted by the parties that the company was not guilty of any fault or negligence; and in the later case of *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 42 Am. & Eng. R. Cas. 392. (decided by the supreme court of Illinois on May 14, 1890), it is stated as follows: "In *Oppenheimer v. United States Express Co.*, 69 Ill. 62, the court held that the contract exempting carriers from liabilities is not to be construed as providing against loss or injury occasioned by actual negligence on their part." Indeed, the case of *Oppenheimer v. United States Express Co.*, has no application to this present case. In the present case the shipper was not guilty of fraud or unfair dealing, and the express company was unquestionably guilty of culpable negligence. In the case of *Orange Co. Bank v. Brown*, 9 Wend. (N. Y.), 85, 114, *et seq.*, an intended passenger on a steamboat, without paying extra fare, took with him on the steamboat as baggage an ordinary traveling trunk containing \$11,250. In a few minutes afterwards the trunk and its contents were removed, and the owner never recovered them. The owners of the steamboat had no knowledge of the contents of the trunk, nor of their great value, and it was held that they were not liable for their loss. Other distinctions might be shown between this case and the cases relied on by the express company, if it were thought necessary.

The stipulation contained in the receipt given by the express company in the present case, limiting its liability for loss or damage, does not limit its liability, except with respect to an amount in excess of \$50. Up to that amount the express company's liability remains precisely the same as it would be at common law, or as it would be if no contract limiting its liability had ever been made. But for the excess above \$50 the express company claims that it has obtained a boundless immunity from liability; that it has not only obtained an absolute exemption from all liability for all loss or damage above that amount, where the loss or damage has occurred without fault or negligence on its part, but that it has also obtained such an exemption where the loss or damage has been occasioned by its own negligence, or by its own fraud or willful wrongs, including the willful destruction of the property, or the greater wrong of feloniously stealing it. This cannot be correct. The stipulation in such receipt ought to be so construed as to exempt the company from liability

All exemption
from liability
above fifty
dollars not
allowable.

for only such loss or damage in excess of \$50 as might be occasioned by the fault or negligence of others, or as might result from some accident, casualty, or misfortune over which the company could have no control. I think the weight of authority sustains this view. While a common carrier may make a valid contract exempting himself from his common law liability as an insurer and for losses occasioned by the acts of others without his fault, or occasioned by such of his own acts only as do not involve any kind of wrong, or occasioned by circumstances over which he has no control, yet he cannot make a valid contract exempting himself from liability for losses occasioned by his own carelessness or negligence or improper acts. Such a contract would be against public policy, and void. I think the contract in the present case should be construed precisely as though it did not attempt to limit the express company's liability at all for losses occasioned by its own negligence or improper conduct, and I would refer to the following authorities in support of this view: *Kallman v. United States Express Co.*, 3 Kan. 205; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158; *Kansas City Pac. R. Co. v. Peavey*, 29 Kan. 169, 11 Am. & Eng. R. Cas. 260; *Western Union Telegraph Co. v. Crall*, 38 Kan. 679, 21 Am. & Eng. Corp. Cas. 206; *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53; *American Express Co. v. Sands*, *Id.* 140; *Grogan v. Adams Express Co.*, 114 Pa. St. 523, 30 Am. & Eng. R. Cas. 9; *Weller v. Pennsylvania R. Co.*, 134 Pa. St. 310, 42 Am. & Eng. R. Cas. 390; *Southern Express Co. v. Moon*, 39 Miss. 822; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; *Southern Express Co. v. Seide*, 67 Miss. 609, 42 Am. & Eng. R. Cas. 398; *Kirby v. Adams Express Co.*, 2 Mo. App. 370; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 30 Am. & Eng. R. Cas. 17; *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; *The City of Norwich*, 4 Ben. (U. S.), 271; *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681; *Rosenfeld v. Peoria, D. & E. R. Co.*, 103 Ind. 121, 28 Am. & Eng. R. Cas. 107; *Adams Express Co. v. Harris*, 120 Ind. 73, 40 Am. & Eng. R. Cas. 151; *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166, 21 Am. & Eng. R. Cas. 87; *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 42 Am. & Eng. R. Cas. 528; *Erie Dispatch v. Johnson*, 87 Tenn. 490, 40 Am. & Eng. R. Cas. 113; *Louisville & N. R. Co., v. Wynn*, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 312; *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 42 Am. & Eng. R. Cas. 372; *Black v. Goodrich Transportation Co.*, 55 Wis. 319; *Mobile, etc., R. Co. v. Hop-*

kins, 41 Ala. 486; Adams Express Co. v. Stettaners, 61 Ill. 184; Chicago & N. W. R. Co. v. Chapman, 133 Ill. 96, 42 Am. & Eng. R. Cas. 392; Judson v. Weston R. Corp., 6 Allen. (Mass.), 486; Orndorff v. Adams Express Co., 3 Bush, 194; United States Express Co. v. Packman, 28 Ohio St. 144; Lamb v. Camden & A. R. Co., 46 N. Y. 271.

In my opinion, notwithstanding the stipulation in the aforesaid receipt, limiting, to some extent, the liability of the express company, the company was still bound, at its peril, to act in good faith, as towards its employer, and to exercise reasonable care and diligence with respect to its employer's goods. There was ample evidence to show negligence on the part of the express company, if not gross negligence. The goods were shipped from Kansas City in good order. When they arrived at their destination at Lawrence, the box containing them was found broken. With due care, however, they might still have been saved, as is fairly inferable from the evidence, and as was the opinion of the jury according to their findings. The box, however, was turned over by one of the express company's agents, and a piece came out. Afterwards the company's agents attempted to take the box and contents from the express car in which they were transported, and to put the same on a truck, and in doing so some of the type and some of the electrotype plates fell down between the car and the platform. Afterwards they gathered them up, and put them into a coal scuttle, and took them to a house belonging to the express company, where they remained for some time, and were afterwards removed to the express company's office, where they still remain, so far as is shown. This seems like gross negligence. It was not necessary, however, that gross negligence should have been shown. Ordinary negligence only, or, in other words, a want of ordinary care, was all that was necessary. In the case of Kallman v. Express Co., *supra*, the following, among other, language, with reference to express companies limiting their common law liability, is used: "An examination of the authorities bearing upon this point will, we think, show that they may do so, provided, however, that due care and diligence be used in the discharge of their trust. But carriers cannot in this way shield themselves from the consequences of fraud, gross negligence, and want of care. * * * It is only when such carriers act in good faith, and use due care and diligence in and about their business, that the law permits them to have the benefit of limitations like that under consideration." In the case of Railroad Co. v. Wynn, *supra*, the following, among other language is used by the court: "The author of American and English Encyclo-

pædia of Law says: 'By the clear weight of authority in England, Canada, the United States, and almost without exception in the states of the Union, the rule has been adopted that the common carrier can make no contract the effect of which will be to exempt him from liability for negligence.' 2 Am. & Eng. Ency. of Law, 822. Partial exemption from liability invalid.

Is the limitation in the contract before us within the prohibition of this eminently just and generally accepted principle? Manifestly the stipulation does not contemplate total exemption from liability; it only provides for partial or limited exemption. Upon that distinction the nice and important question arises, can a stipulation of the latter character stand before the law when one of the former kind cannot? Or, to state the same question differently, and so as to apply it more directly to the facts of this case, the rule of law being established, as we have seen it is, that the defendant company could not lawfully have contracted with the plaintiff that it would in no event be liable for any part of the value of the mare, if lost or destroyed, can the limitation of its liability to \$100 be upheld in the courts, if it should appear that her death resulted from the negligence of the company, and that she was in fact worth eight times that amount, as the jury found her to be? We unhesitatingly answer, 'No'. The carrier cannot by contract excuse itself from liability for the whole or any part of a loss brought about by its negligence. To our minds, it is perfectly clear that the two kinds of stipulation—that providing for total, and that providing for partial, exemption from liability for the consequences of the carrier's negligence—stand upon the same ground, and must be tested by the same principles. If one can be enforced, the other can; if either be invalid, both must be held to be so, the same considerations of public policy operating in each case. With great deference for those who may differ with us, we think it entirely illogical and unreasonable to say that the carrier may not absolve itself from liability for the whole value of property lost or destroyed through its negligence, but that it may absolve itself from responsibility for one-half, three-fourths, seven-eighths, nine-tenths, or ninety-hundredths of the loss so occasioned. With great unanimity the authorities say it cannot do the former. If allowed to do the latter, it may thereby substantially evade and nullify the law, which says it shall not do the former, and in that way do indirectly what it is forbidden to do directly. We hold that it can do neither. The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation

for exemption in whole or in part from the consequences of its negligent acts." In the case of *Express Co. v. Seide*, *supra*, the supreme court of Mississippi decided as follows: "A stipulation in a receipt given by an express company that, if the value of the goods shipped is not stated by the shipper and specified in the receipt, the holder will not demand more than \$50, for loss or damage, exempts the carrier from greater liability only when the loss did not result from negligence on its part. This is true, although a greater charge is made for carrying packages over \$50 in value, and the shipper fails to state the value, and pays the minimum charge." Part of syllabus. In the case of *Kirby v. Adams Express Co.*, *supra*, the court of appeals of St. Louis, Mo., decided as follows: "A clause in a contract between an express company and a shipper stated that goods shipped are of the value of \$50, unless their value should be inserted in the contract, and that the company in case of loss, would not be liable for more than \$50, unless the value was so inserted, and the value of the goods was not inserted. *Held*, that this did not relieve the company from liability for the full value of the goods if lost through its fault, and that a presumption of negligence arose from the mere fact of loss." Part of syllabus. In the case of *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 30 Am. & Eng. R. Cas. 17, the supreme court of Missouri decided as follows: "While a shipper may release a common carrier from its obligation as an insurer of his property, yet the carrier cannot, by any kind of stipulation, exempt itself from liability for its own negligence." Part of syllabus. See, also, the other cases above cited, and especially the *Pennsylvania* cases. I think the judgment of the court below should be affirmed.

Validity of Stipulations Limiting Carrier's Liability to Particular Amount.—

See *Louisville & N. R. Co. v. Wynn* (Tenn.), 45 Am. & Eng. R. Cas. 312, note 319. *Durgin v. Am. Ex. Co.* (N. H.), 45 *Id.* 325; *Western R. of Ala. v. Harwell* (Ala.), 45 *Id.* 358.

DIMMITT *et al.*

v.

KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. Co.

(Missouri Supreme Court, Division No. 1, March 9, 1891.)

Carriers—Connecting Lines—Statute imposing Liability—Constitutional Law.—Rev. St. Mo. 1879, § 598, provides that when a common carrier receives property to be transferred from one place to another, within or without the state, or when it issues receipts or bills of lading in the state, it "shall be liable for any loss, damage or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad or transportation company, to which such property may be delivered, or over whose line such property may pass," and that the carrier issuing the receipt or bill of lading, may recover the amount which it may be required to pay the owner of the property, from the carrier whose negligence caused the loss or injury. *Held*, that this statute is valid, being a mere rule of evidence, and violative of none of the rights of the carrier, constitutional or otherwise.

APPEAL from Circuit Court, Buchanan County.

Strong & Mosman, for appellant.*Ramcy & Brown*, for respondent.

BRACE, J.—This case is certified here from the Kansas City court of appeals as one involving a constitutional question. The material averments of the petition are that the plaintiffs delivered to the defendant, at the city of St. Joseph, in the state of Missouri, one box in good order, containing 6,000 cigars, of the value of \$315, marked and consigned to one J. McAleer at the city of Deadwood, in the territory of Dakota, to be carried and delivered to said consignee at said Deadwood according to said marks and directions; that said defendant then and there received said box of cigars for the purpose aforesaid, and issued to plaintiff the following receipt or bill of lading: "Received, St. Joseph, Mo., 6-10, 1881, from J. W. Dimmitt & Co., in apparent good order, by the K. C., St. J. & C. B. Railroad Company, the following articles marked as below, which are to be delivered without unnecessary delay in like good order, at Omaha station, to consignee or owner, or to such company or carriers as per marks and directions in margin, subject to its charter, freight regulations, and agreements. In witness whereof, the agent of said railroad hath affirmed the three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void." Case stated.

MARKS AND CONSIGNEES.	NO. PKs.	ARTICLES.	WEIGHT.
J. W. McAleer, Deadwood, D. T. via Ft. Pierre. Acct. Dougherty & Co.	1	Box Cigars, strapped, corded and sealed.	200."

That the defendant carried said box to Omaha, and delivered the same to the Chicago & Northwestern Railroad Company, which company carelessly and negligently failed to deliver said box to said Dougherty & Co., whereby said cigars became worthless and were totally lost to plaintiffs. The answer of the defendant was a general denial. The case was tried by the court without a jury upon the following agreed statement of facts: "It is agreed between the parties hereto, for the purposes of a trial of this cause only, that the plaintiffs are partners in business at St. Joseph, Mo. The defendant is a corporation duly incorporated and organized for railroad purposes, and engaged in the business of a common carrier over its line of railway, which extends from Kansas City, in the state of Missouri, through St. Joseph, in said state, to Omaha, in the state of Nebraska, which latter is its northern terminus; that the Chicago & Northwestern Railroad Company is a corporation duly incorporated and organized for railroad purposes, owning and operating a railroad from Omaha, Nebraska, to Fort Pierre, Dakota, and engaged in the business of a common carrier over the same; that Deadwood, the destination of the goods hereinafter mentioned, and the residence of J. McAleer, is in Dakota, several hundred miles from Omaha, and not upon the line of any railroad; that the usual route and course of transportation of freights from St. Joseph to Deadwood is over the defendant's road to Omaha, thence over the Chicago & Northwestern Railroad to Ft. Pierre, and thence by wagons and teams to Dougherty & Co. to Deadwood; that on the 15th day of June, 1881, the plaintiffs delivered to the defendant at St. Joseph the goods described in the account or bill of items attached to the petition herein, or the value therein stated, in a box marked 'J. McAleer, Deadwood, D. T., via Ft. Pierre, care Dougherty & Co.,' and presented at the same time a receipt or bill of lading furnished and prepared by them [being the same attached to the petition] to the station agent of the defendant at St. Joseph, who received said goods, and signed and delivered said receipt as and for the shipment of the goods in said bill of items described over defendant's road;

that under the stipulations and terms of said receipt, or bill of lading, attached to the petition, defendant carried promptly and seasonably said box to Omaha, and seasonably delivered the same to the Chicago & Northwestern Railway Company, a connecting carrier at that point, for further transportation towards their destination, marked in the manner above stated; that said box of cigars, after being carried by said Chicago & Northwestern Railway Company to Pierre station, on its line, was there stored for a long time in its warehouse, and afterwards sold by it for account of whom it might concern, and to pay storage charges, and was not delivered to said McAleer at Deadwood; that plaintiffs have paid no sum or amount whatever for the carriage of the goods, either to defendant or any other; that there was no contract between plaintiff and defendant save that which is recited in the bill of lading or receipt attached to the petition, which was entered into under the foregoing facts and circumstances." The court declared the law of the case by the following instruction given at the request of plaintiff: "If the acts of the Chicago & Northwestern Railway Company, set out in the agreed statement of facts herein, were careless and negligent, and the loss of plaintiff's cigars was caused solely by such negligence, the finding and judgment should be for plaintiff for the value of said cigars." Found for the plaintiffs, and from the judgment in their favor on such finding the defendant appeals.

The decision of the trial court involves the proper construction of section 598, Rev. St. 1879, which reads as follows: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues receipts or bills of lading in this state, the common carrier, railroad, or transportation company issuing such bill of lading shall be liable for any loss, damage, or injury to such property, caused by its negligence or the negligence of any other common carrier, railroad, or transportation company, to which such property may be delivered, or over whose line such property may pass; and the common carrier, railroad, or transportation company, issuing any such receipt or bill of lading, shall be entitled to recover, in a proper action, the amount of any loss, damage, or injury it may be required to pay to the owner of such property from the common carrier, railroad, or transportation company, through whose negligence the loss, damage or injury may be sustained." This statute was first enacted in 1879. It is suggested in the brief of counsel for appellant that this statute is violative of some constitutional

Provisions of
acts.

provisions, under a construction which would render the defendant liable in this case. In order to determine whether it is obnoxious to any constitutional inhibitions, state or national, it becomes necessary, first, to ascertain its true scope and meaning. At the time of its enactment, the law was well

Scope and
meaning of
act.

settled as now that a common carrier may contract to carry to a place beyond the terminus of his route, and thereby render himself liable as such for the whole distance, but that he is not required by law to transport beyond his own line, and therefore may stipulate that he shall not be liable except for such loss or damage as may occur on his own route. While there was a universal *consensus* of opinion upon these propositions, there was a diversity of opinion as to what should be evidence of a contract for through carriage when no special contract was made. The English and the courts of some of the states holding that where a common carrier takes into his care a parcel directed to a particular place, and does not by positive agreement limit his responsibility to a part only of the distance, it is *prima facie* evidence of an undertaking on his part to carry that parcel to the place to which it is directed, "although such place was beyond the terminus of his own route." *Lawson. Carr.* § 239. The majority of the American courts, however, holding "that when a carrier receives goods marked for a particular destination beyond the route for which he professes to carry, and beyond the terminus of his road, he is only bound to transport and deliver them according to the established usage of his business, and is not liable for losses beyond his own line." *Id.* § 240. In 1870 this court, in the case of *Coates v. United States Express Co.*, 45 Mo. 238, adopted what may be called the "American doctrine" on this subject, quoting with approval the language following of Prof. Parsons, formulating the rule: "The prevailing rule in this country may now be said to cast upon the carrier no responsibility as carrier beyond his own route, unless the usage of the business or of the carrier, or his conduct or language, show that he takes the parcel as carrier for the whole route." 2 *Pars. Cont.* (7th Ed.) 227. This ruling was followed in *Snider v. Adams Express Co.*, 63 Mo. 376, decided in 1876. The consideration given by the supreme court to this question, and the conclusion reached by it so recently before this enactment, when taken in connection with the terms employed in the statute itself, leaves little room for doubt that the purpose of the legislature was to prescribe a definite rule of liability for negligence of a common carrier in harmony with what has been denominated the "English rule" upon the subject, whereby such carrier, when he receives a parcel to be trans-

ported to a place beyond the terminus of his route, is to be held liable as such to the place of destination, in the absence of a specific contract to carry such parcel only to the terminus of his own route, or limiting his liability to loss or damage occurring on his own route. The enactment as thus construed becomes a rule of evidence by which to determine what the contract of the carrier is in the absence of a specific one in a given case, operates with no undue hardship upon the carrier, and is violative of none of his rights, constitutional or otherwise. By its provisions the act of acceptance by a common carrier of property to be transferred to a place beyond the terminus of its route is evidence of a contract to carry such property to the place of its destination. The act of issuing a receipt or bill of lading for property to be transferred to a place beyond the terminus of the route of a common carrier is evidence of a contract by such carrier to carry such property to the place of its destination. This *prima facie* case the statute makes for the plaintiff on the facts stated. In order to defeat it, the defendant must show that by specific agreement it only contracted to carry the property to the terminus of its own line, or, what is equivalent, that there was a specific agreement that it was to be liable only for loss or damage occurring on its own line. The evidence in the case fails to show any such specific agreement. On the face of the whole transaction it was evidently a through shipment from St. Joseph, Mo., to Deadwood, D. T., and was so regarded by both parties. Under the statute the receipt of the goods and the issuance of the bill of lading concludes all questions as to the authority of the agent to contract for the delivery of the goods at the point of destination. The goods were lost to the plaintiff by the negligence of the Chicago & Northwestern Railroad Company, the defendant's agent, to whom it entrusted the goods to be transported and delivered under the bill of lading to Dougherty & Co., at Ft. Pierre, and we do not find in the case any valid constitutional objection to a recovery against the defendant for such negligence. The judgment of the circuit court of Buchanan county is therefore affirmed.

Act a mere
rule of evi-
dence and not
invalid.

SHERWOOD, C. J., and BLACK and BARCLAY, JJ., concur.

STATE *ex rel* ATTORNEY GENERAL

v.

PENSACOLA & ATLANTIC R. CO.

(Florida Supreme Court, March 14, 1891.)

Carriers—Posting Rates and Regulations—What is Sufficient.—General rule 4, adopted by the railroad commission September 23, 1889, and requiring each railroad company to post in a conspicuous place, and keep continuously posted in each of its stations, a copy of the schedule of its freight and passenger rates, revised and adopted by the commission for the use of the company, rules and regulations, official classifications, and table of distances, means that the publication shall be in placard or bill form, and that the placards shall be so attached to something in a conspicuous place in each station that they can in the position in which they are placed, or without being removed, be read conveniently by the public, and that they shall be kept posted in this manner continuously. Nailing up by one corner in a conspicuous place in a station, and in such manner as to be accessible to every one, a pamphlet of about 11 printed pages, containing the rules and regulations governing the transportation of passengers and freight, or a similar pamphlet containing the classifications, is not a posting within the meaning of the rule, nor is the binding of these pamphlets and the schedules of freight and passenger rates together, and placing them conspicuously upon a conspicuous shelf desk in the station agent's office, such a posting.

Sufficiency of Schedule of Passenger Rates.—Where a schedule of passenger rates is headed "Pensacola and Atlantic Railroad Ticket Rates," and it states the full sum charged as fare from each station to any other station, that half rates will be charged for children between designated ages, travelling with parents or guardian, and that no charge will be made for those under a specified age travelling in the same manner, and gives the extra charge to be collected of passengers who omit to purchase tickets, and it is not denied that the charges correspond in amount with the passenger rates revised and adopted by the railroad commission for the use of the company, and it does not appear that passenger rates have ever been prescribed or adopted by the commission in any other form for the company, the schedule will be *held* sufficient as to its contents, and the company cannot be required, in a proceeding by *mandamus*, to state in such schedule the rate per mile, or the distances between stations, in the absence of any law or any rule of the commission requiring it.

Same—Distances between Stations.—General rule 4, adopted by the railroad commission September 23, 1889, does not require that the schedule of passenger rates shall state the distances between stations.

Sufficiency of Table of Distances between Stations.—A table which does not of itself, or upon its face, give the distance between any two stations on a railroad, is not a table of distances within the meaning intended by general rule 4 of the railroad commission. It is not sufficient if the schedule merely supply *data* for computing these distances between stations.

Schedule in Two Parts.—The fact that a schedule of passenger rates is in two parts, or on two cards instead of one, is not, where the two cards may be posted together, and, so posted, read as one, of itself a violation of the rule requiring the schedule to be posted.

Size of Type for Schedules—Mandamus.—In the absence of a rule of the railroad commission, or a law, prescribing the size of type in which a schedule of passenger rates or table of distances shall be printed for posting, a court cannot, by *mandamus*, direct what size type they shall be printed in.

Rules Applicable to Defendant—Posting.—Passenger rule 6, and freight rules 3 and 11, of the rules adopted by the railroad commission September 23, 1889, are not inapplicable to the Pensacola & Atlantic Railroad Company. They should be posted as other rules applicable to it.

Duty to Post Special Rates.—Where a railroad company has, under freight rule 3 of the railroad commission, the right to make, at its discretion, special rates, reduced below commission rates, for particular persons and places for temporary use, such special rates need not be posted under the requirements of general rule 4 of the railroad commission.

Duty to Keep Rates Continuously Posted—Posters Furnished Agents.—It is the duty of railroad companies not only to post, but to keep continuously posted, as provided by general rule 4, whatever falls within its provisions. Furnishing the posters to agents, with instructions to post, does not answer the public duty imposed upon the companies.

Application for writ of *mandamus*.

William B. Lamar, Atty. Gen., for the State.

William A. Blount, for defendant.

RANEY, C. J.—This is a proceeding in *mandamus*, instituted before this court in the exercise of its original jurisdiction.

1. Among the rules and regulations prescribed by the railroad commission is one adopted September 23, 1889, and known as "Rule 4," which was published as a part of "Circular No. 23," and went into effect October 15, 1889, and reads as follows: "Each railroad company shall post in a conspicuous place, and keep the same continuously posted, in each of its stations, a copy of the schedule of freight and passenger rates revised and adopted for the use of such company by the commission, a copy of all the rules and regulations prescribed by the commission for the government of the transportation of freight and passengers applicable to its line of road, and a copy of the official classification; also copies of all changes made, whether the same shall be made by such railroad company or by the commission; also a table of distances between each station."

Provisions of
Rule 4.

On the 16th day of December, 1889, the commission issued "Circular No. 24," addressed "To the railroad companies doing business in Florida," in which it is stated and called to the attention of these companies that the commissioners had lately visited a number of stations and offices, and upon investigation discovered that the above rule had not been fully complied with; that "at no place were the rules and regulations of the commission, nor the classification of freights, posted as the rules and regulations prescribed by the commission direct. In fact some of the agents alleged that rules and regulations as

Circular issued by commissioners.

embraced in circular No. 23 had not been furnished them at all. In most cases, but not all, of the few instances where any effort was made to do so, they were hung on a nail, in a pamphlet form. This last is not a posting, and is not in compliance with the rules. They should be posted as are the freight and passenger schedules, in placard or poster form. Section 6, Railroad Commission Laws. The schedules of passenger and freight rates were found to have been posted in very few instances, and then very often not in a conspicuous place, as the law directs. In some instances they were said to have been torn down, but there was no evidence of any effort to replace them, and thus to keep them continuously posted." This circular 24 also states that the commission have, instead of multiplying formal orders, adopted it as a means of calling the attention of the railroad companies to especially the posting, and that after January 1, 1890, the commissioners will visit the different stations and offices of each railroad doing business in the state, and hope to find that this suggestion has prompted the careful posting in the manner indicated, appropriately in the freight and ticket offices, of the several documents referred to in general rule No. 4.

The complaint made against the respondent, who is alleged to have had due notice of such rule 4, and of the subsequent circular 24, is as follows: That at its station at Marianna the respondent has made no attempt to comply with the requirements of said rule, and at another station, Milton, has not in full complied with the requirements of the rule.

That at other important stations, viz., River Junction, Chipley, and De Funiak Springs, and at all other stations along the line of its road where much business, passenger and freight, is being done, no pretense is made of complying with the requirements of said rule 4, but the company has neglected and refused, and still neglects and refuses, to post, and keep continuously posted, with exceptions stated, in a conspicuous place in each of its stations:

(1) A copy of the schedule of freight and passenger rates revised and adopted for the use of this company.

(2) A copy of all the rules and regulations prescribed by the commission for the government of the transportation of freight and passengers applicable to said line of road.

(3) A copy of the official classification.

(4) Copies of all changes, whether the same shall be made by the railroad company or the commission.

(5) A table of distances between each station.

That in many cases where such posting had been made or

**Complaint
against re-
spondent.**

attempted, it has been done by hanging in the office at the stations upon a nail, in pamphlet form; that such posting should be done in placard or poster form, for the convenience and information of the public.

The defendant filed an answer, the purport of which will be given in disposing of the several questions presented for decision. The attorney general has moved to strike out the answer, and for a peremptory writ, upon the ground that the same discloses the fact that full compliance has not been made to the alternative writ of *mandamus*, and that the answer is argumentative, uncertain, and insufficient, and does not state facts so that a judgment of the court can be had thereon, which motion is accompanied by a statement or points of objection to the answer.

Respondent's
answer.

The deficiencies of the answer are not, nor are the objections stated to it, such as call for the exercise of the power to strike out. The motion to strike in the Drew Case, 16 Fla. 303, was as to impertinent and surplus matter in a return to a peremptory writ. We shall treat the motion for a peremptory writ as a demurrer to the answer, of which it is the equivalent. *State v. Trustees*, 20 Fla. 402.

The respondent, declaring its purpose to have been to comply with rule 4, says in its answer that shortly after the promulgation of the rule it furnished its agents at its several stations with the "placards, posters, and papers" hereinafter mentioned, with instructions to post and keep them posted conspicuously at such stations, and that it is informed and believes that they were so posted or placarded at the same time, and at each of said stations except at River Junction, and respondent has believed them to have remained conspicuously posted, as no report or complaint of their absence has ever been made to it; that, feeling and believing that it had complied with the rules of the commission, it did not in any wise apply to itself the very general complaint made by "Circular 24," and says it has, with the above exception, complied fully with rule 4, as it has understood and understands it, and proceeds to show how it has done so.

2. The respondent submits, as in full compliance with rule 4, a copy of a schedule of the freight rates revised and adopted by the commission for the use of respondent, the same being in the form of a card or bill, 10 by 16 inches, and copies of 5 commodity tariff sheets, issued by respondent, and which are stated to be merely the application to particular commodities of the classification and rates fixed by the commission, copies of which schedule and sheets the answer states have been placarded.

Sufficiency of
posting of
freight rates.

The attorney general admits that if this schedule is kept conspicuously and continuously posted in the station houses of respondent it will be a sufficient compliance with the rules and regulations of the commissioners. In view of this admission, and the fact that no exception is taken to the commodity sheets, (nor, we may remark, do they seem to suggest any), the answer must be held sufficient as to posting all freight rates at those stations where such schedule and sheets are in fact kept continuously posted in a conspicuous place.

3. The answer exhibits a copy of "passenger rates revised and adopted for the use of respondent by the commission,"

Sufficiency of
schedule of
passenger
rates.

which it is urged is a compliance with rule 4, and says it has been "placarded, the front of one copy and the back of a second copy being nailed or posted side by side so as to form one copy." The answer also states that "in addition thereto there has been posted a large placard, showing the rates from each station on the road of respondent to every other station thereon, and to every station on the Louisville & Nashville Railroad."

The attorney general suggests that a schedule of passenger rates is a table showing the rate per mile for each full passenger fare, and that to post this there should be a table showing the fare from each station to any other station on the line of road; that the freight schedule, *supra*, shows the sum total for each haul for each distance, giving the distance of each, and so should a properly constructed passenger schedule or tariff.

It is true that the schedule of passenger rates does not expressly state the rate per mile for each full passenger fare, but it (to say nothing of the allegations as to the "large placard") does show the fare or full charge from each station to any other station on the road; and it cannot on these pleadings be pretended that the charges so published do not in amount accord with the passenger rates prescribed or "revised and adopted" by the commission for the use of the respondent, or that passenger rates for this company have ever been adopted by the commissioners in any form than that of the full charge from each station to any other shown by this schedule. Besides this, as we understand the schedule, it does afford, through the numbers on the left of the names of stations in the middle column, the means of ascertaining the distance between any two stations on the road, and thereby enables any one to compute the rate per mile by dividing any given charge from one station to another by the distance between such stations; but ignoring this fact, and the further fact that the freight schedule gives only charges (per hun-

dred pounds, barrel, crate, ton, and car-load) for the distance of 10 miles or less, and 10 miles and over 15, and for certain other distances, varying from each other at least 5 miles, still we neither find, nor have been shown, any rule or regulation of the commission which prescribes that the passenger schedules shall state the charge per mile or give the distance from any one station to the other stations. The schedule presented is headed "Pensacola and Atlantic R. R. Ticket Rates," and gives the passenger fare from each station to every other one, states that half rates will be charged for children over five years and under twelve travelling with parent or guardian, and that no charge will be made for children under five years travelling under similar care, the extra charge to be collected when passengers have omitted to purchase tickets, as well as other information as to passenger transportation, not necessary to be noticed here. Even disregarding entirely the *data* it seems to afford for ascertaining distances, it, considering its contents, is a schedule of passenger rates, which must be held sufficient in the absence of some authoritative definition of law or a rule or regulation of the railroad commission, or some custom having the force of law, requiring that the information it gives shall be in a different form, or making the statement of the rate per mile or the distance between stations, a necessary constituent of such schedules. The function of the writ of *mandamus* is to compel the performance of a clear and specific legal duty, and until some competent authority has made it the clear duty of the respondent to use a different form of schedule, or to incorporate the information under consideration in such schedules, it cannot, in this proceeding, be required to do so. The contents of the schedule before us constitute in substance a passenger schedule, giving the fare from any given station to all other stations, in the only form, so far as the record informs us or we can for the purposes of this hearing know, in which passenger rates have ever been adopted for the defendant by the commission, and other information, and, being such, the fact that we might think the public interest would be advanced by its being in a different form, or having elements which it has not, does not confer any power upon this court, or change the function of the remedy invoked. Rule 4 requires, it is true, a separate table of distances between each station, but whether this provision of the rule has been complied with is a point to be considered hereafter.

It is also objected that the schedule is printed in type of too small a size to inform the public, in the hurry incident to travel, of its contents, and that the passenger rates should be in large type, like the copy of the freight schedule. The body

of the print is in nonpareil type. The discretion to say in what type the schedule should be has not been vested in us, and, until the railroad commission shall have prescribed the size of the type and figures to be used by this or any railroad for the purpose in question, we are powerless to aid them in a proceeding by *mandamus*, the function of which is to enforce the performance of a prescribed legal duty, but not to prescribe one; just as we are to require the use of a different form of schedule. We cannot assume functions belonging to the commission, or other functions or departments of the government.

The objection that the schedule is in two parts, likely to become disengaged, is in itself, in the absence of a requirement that the schedule shall be on a single card or sheet of paper, an untenable objection, for if the two cards are in fact kept posted together in a conspicuous place in each station in such manner that the two can be read as if they were one card it is sufficient. The two thus posted up in a reasonably secure manner would stand as long as one card, and there is not such likelihood of their becoming disengaged as to make this use of two cards a violation of the rule as it stands. The record does not show that this schedule has been torn from a pamphlet.

4. The answer also states that the rules and regulations for the government of the transportation of persons and property on the railroads in Florida have been "posted in the pamphlet form in which they were caused to be printed by the commission," and a copy of the same is annexed to the answer, and marked "C." "They," says the answer, "were, as to freight, in a large part, also contained in the local classification, of which a copy is hereto attached, marked 'D,' in which is embodied the practical application of very many of said rules to the classification of freight contained in said Exhibit D. In fact the said Exhibit D, in some instances, contained modifications by the commission of the rules contained in said pamphlet, and therefore more correctly sets forth the regulation of the commission than did the rules themselves." "The passenger rules were not only posted in said pamphlet 'C,' but have been posted in the placard showing ticket rates."

The exception taken on behalf of the state to the compliance thus attempted to be shown by respondent is, in short, that the rules and regulations are necessarily, and as they explain themselves, applicable to each railroad in the

Same—Size of
type—Manda-
mus.

Same—Sched-
ule in two
parts.

Posting rules
and regula-
tions—
Pamphlet
form.

state, and that they should be printed and posted in placard form, they being few in number and easily printed in good-sized type upon a moderate-sized poster; that the commission is not required to do more than inform the respondent of the rules and regulations, and any subsequent modification of the same; and that tacking them up in the offices in the pamphlet form in which they were caused to be printed by the commission, is only a pretense of posting.

The printed pamphlet, C, of "Rules and regulations governing the transportation of passengers and freights on the railroads in Florida, prescribed by the railroad commissioners," is the entire "Circular No. 23," previously referred to in this opinion, and it purports to have been issued September 23, 1889, by the railroad commission, by an order which is as follows: "The following rules and regulations are prescribed for the government of the transportation of persons and property by the railroad companies doing business wholly or in part within the state of Florida, and all others conflicting therewith being hereby repealed." It contains 36 rules, covering about 11 pages, printed in long primer type, and the print occupying on each page an average space of $6\frac{1}{4}$ inches long, by $3\frac{1}{4}$ inches wide, and has a cover upon which is printed the words first quoted in this paragraph.

The purpose of rule 4 in requiring these rules and regulations to be kept posted in a conspicuous place in each station is that the public may see and read, and thereby inform themselves of the contents of the same. The word "post" is defined by Webster as meaning "to attach to a sign-post, or other usual place of affixing public notices; and he defines the word "poster" as "a large bill posted for advertising." The meaning of the word "posted," as used in rule 4, is that the rules and regulations should be advertised in the form of a poster in the railroad stations; or, in other words, that, printed in bill or placard form, they shall be so attached to something in a conspicuous place in the stations that they can, in the position in which they are placed or without being removed, be read conveniently by the public. This is the usual and ordinary meaning of the term "posted," as we see it manifested daily in the posting of notices like those of sale, or against trespasses, as well as other kinds. No other construction can be given it without straining its ordinarily understood meaning, nor does any other meaning so well fulfill the purpose and intent of rule 4, that these rules and regulations should be exhibited in the places stated for the information and benefit of the public. We do not think the purpose of the act, that these rules and regulations should be posted, is met by the use of a pamphlet. Such a publica-

tion does not come up to the idea ordinarily conveyed by the expression of the rule. A pamphlet is not the form in which notices are ordinarily posted. We are satisfied that if a card containing these rules and regulations should be kept hung upon a nail in a conspicuous place in the railroad station, and in such position that while so hung up it could be read with reasonable convenience by the public, the rule would be complied with; but we do not think the fact that copies of this pamphlet have been nailed to the upper left hand corner in such manner that they are accessible to every one is a compliance with it. This, in our opinion, is the meaning and effect of rule 4, independent of the circular of December 16, 1889, and of course there is nothing in that paper that can be construed to deprive the rule of such meaning.

The local classification, Exhibit D, mentioned in this connection, is also in pamphlet form, and for the same reason is insufficient, in so far as it is relied upon as a posting of any part or modification of the rules and regulations.

"Very many of the rules prescribed by the commission, for example, passenger rule 6, freight rule 3, freight rule 11," etc., says the answer, "are mere restrictions upon railroads, and in the opinion of the respondent are not required to be posted; but, leaving them for respondent to determine what are applicable to it, the respondent submits that before it can be held to be in fault in any wise the particular rule to be posted should be specified by the commission or the court."

We fail to see that either passenger rule 6 or freight rules 3 and 11 are not required to be posted. They are as follows:

"Rule 6. A railroad company shall not be prevented from the free carriage of destitute or homeless persons transported by charitable societies and the necessary agents employed in such transportation; or from the issuance of mileage, excursion, commutation, or round trip passenger tickets; or from giving reduced rates to ministers of religion; or from giving free carriage to their own officers and employes; or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; or free carriage or reduced rates to persons in charge of live stock shipped from the point of shipment to destination and return; or from issuing second-class tickets, for the holders of which second-class tickets so issued second-class accommodations shall be furnished; or from granting reduced rates to immigrants, or immigration agents, or persons going to or returning from any place of meeting within this state, of any agricultural, mechanical, industrial, educational, religious, or

fruit and vegetable growers' association or convention, who are directly connected with or interested in the objects of said association or convention."

"Rule 3. The rates specified or hereafter to be allowed for common brick, bone, lumber, shingles, laths, staves; rough stone, empty barrels, corn in the ear, melons by the car-load, straw, shucks, fodder, tan-bark, sawdust, household goods, moss, palmetto leaves and heads, are maximum rates, but the railroads are left free to reduce the same at discretion, and all such rates are exempt from the operation of rule 2. Any complaint as to such rates will, upon presentation, be considered. No rates have been prescribed for articles in the classification designated by the letter S. Such articles are subject to special contract. The commission will entertain complaints of excessive charges for the transportation of such articles in all cases except where the price charged was according to contract between shipper and carrier."

"Rule 11. Railroad companies shall not be prevented from the carriage, storage, or the hauling of property, free, or at reduced rates, for charitable purposes, or to or from fairs and expositions for exhibition thereat."

In view of the commission's order of September 23, 1889, adopting the rules, it certainly cannot be said of any one of these rules that it has not been specified by the commission as "applicable" to respondent, nor do we perceive that either of them is not "applicable" to the respondent, or is of a character that its publication does not materially concern the public. No other rule is designated by the respondent as inapplicable to it, and until such designation is attempted we must presume that the commissioners have not burdened the respondent with something in which it can have no concern whatever.

5. Exhibit D, referred to above, is in form a pamphlet of 10 pages, and it is entitled "Louisville and Nashville Railroad Co. Local classification, (S. R. & S. S. Association, with exceptions as noted.) No. 5. Taking effect November 10, 1890. Superseding classification No. 4, and supplement." The answer also designates this as the official classification adopted by the commission, and avers that this classification has been approved by the commission and adopted by the respondent, and that there have been no changes made by the commission or by the respondent in the rates set forth in this exhibit applicable to the whole line of respondent's road, and that the copies of this pamphlet have been nailed to the upper left hand corner in such manner as to be accessible to every one.

Classification
—Nailing up
pamphlet.

In view of the allegations of the answer as to this exhibit,

which allegations have to be taken as admitted by the state on this hearing, such exhibit must be recognized as being the admitted or proper official classification to be posted by defendant under rule 4, as we have heretofore defined the term, which definition is not met by nailing up this pamphlet. The fact that the exhibit was approved by the commission does not relieve the respondent from posting it. This allegation as to approval is to be taken as meaning merely the approval of the actual classification of freight as represented by the schedule, and not of the exhibit as a form for posting under rule 4. The language of the answer is not broad enough to cover the latter idea, or to set up an estoppel against the commission.

It is said that the commission has never ruled that a nailing or hanging up of this classification in book form was a posting, but, on the contrary, (circular 24,) that it was not a posting; but that they have said that if it was thus placed in a conspicuous place, and kept there in each station, they would consider it a compliance with the spirit of the law, and would not interfere unless complaint was made, in which event they would insist upon the placard form. Whether or not there would have been a waiver by the commission of the requirement of rule 4 if the railroad company had accordingly kept this pamphlet so placed in a conspicuous place in its station it is unnecessary for us to decide as the record fails to show that it has done so. In the presence of rule 4, and the exposition of it made by the circular of December 16, 1889, we could hardly enforce a compliance by the company with what it seems the commissioners would, in the absence of complaint, have regarded as a compliance with the spirit of the law.

Respondent claims, under freight rule 3, the right to make, at its discretion, special rates, reduced below commission rates, for particular persons and places for temporary use. **Special rates.** which special rates, it says, have in almost every instance related to lumber. These special rates, the answer admits, have not been posted, and for the reason the respondent has not believed that the rule required them to be. No question is made by the state as to the right of the respondent to make the special rates it may have in fact made, and assuming, as such rule 3 seems to concede, that the respondent has, as to the articles named in that rule, the right to make, at its discretion, special rates for particular persons and places for temporary use, we do not perceive that their publication or posting falls within rule 4, which requires the posting of only the schedules of freight and passenger rates "revised and adopted for the use of such company by the commission."

6. To the complaint that no proper table of distance has

been posted in obedience to the requirement of the rule for the posting of a table of distances the passenger rate schedule discussed in the third sub-division of this opinion is offered by the respondent as a full compliance with such requirement. This schedule does not of itself, or upon its face, give the distances between any two stations, and this is sufficient reason for holding it not to be a table of distances. Though it furnishes *data* from which these distances, as we understand such *data*, may be computed, the distances are not stated in the schedule. It is not in itself a table of distances.

Table of distances.

What has been said above as to the size of the type or print of this schedule is equally applicable to the same objection when made to it as a table of distances.

7. Considering the conclusions announced above as to posting, it is hardly necessary for us to say that binding the papers, posters, and placards together, and placing them "conspicuously upon a conspicuous shelf desk," as has been done in the Marianna station, is not a posting within the meaning and intent of the rule, even though it be, as alleged in the answer, the desk in the station agent's office, where all persons must come who have business with the defendant company, and all such persons and the public have and exercise full and free access to such papers without the intervention of the agent or any other person connected with the defendant, unless such intervention be requested by the person desirous of making an investigation of rates or other matters.

Placing pamphlets on shelf not a posting.

8. Of the statement in the answer that it would cause great expense to defendant to require all the papers submitted with the answer to be put into placard form and placarded, and necessitate, in many cases, an increase of wall space on which to placard them and the poster required for business in connection with roads out of the state of Florida, and would serve no good purpose to the public, we need only say that the conclusion as to the purpose to be served by such posting is but the expression of an opinion, and the general statement that the posting in placard form will cause great expense, or necessitate an increase in wall space cannot be regarded as sufficient to put in question the reasonableness of the rule requiring such posting.

Expense and inconvenience immaterial.

9. Of course, the duty of the defendant under rule 4 is not only to post in a conspicuous place in each station everything within the requirements of the rule, but also to "keep the same continuously posted." There can be no misunderstanding as to the effect of this re-

Duty to post is continuous.

quirement, or where the obligation of performance rests, and a return which should show no further compliance by a railroad company with his feature of the rule than a delivery to the station agents of posters, even of the most satisfactory form, with instructions to post and keep them continuously posted in a conspicuous place in the stations, and that it is informed and believes that they were so placarded and posted at the same time, would necessarily be insufficient. It is the duty of the company both to post and to keep them continuously posted, and the answer fails to show a performance of this duty at any station, even waiving in this connection the deficiencies in the form of some of the papers.

The relator is entitled to a peremptory writ, and judgment will now be entered accordingly ; but as the respondent has expressly declared in its answer its purpose to comply with our views as soon as they shall be indicated, no peremptory writ will be issued by the clerk on such judgment except and until the relators, by the attorney general, or other authorized attorney, shall file a *præcipe* requiring it, whereupon it shall be issued by the clerk without further order.

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